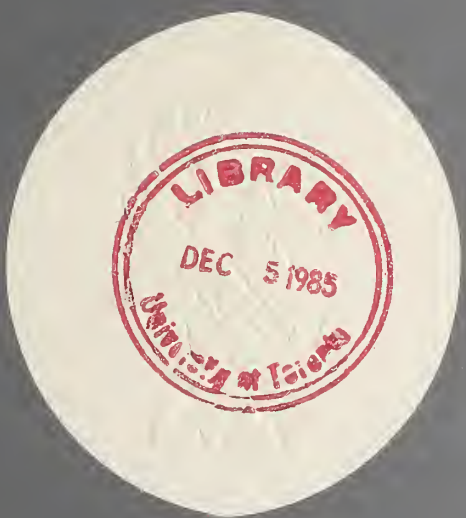
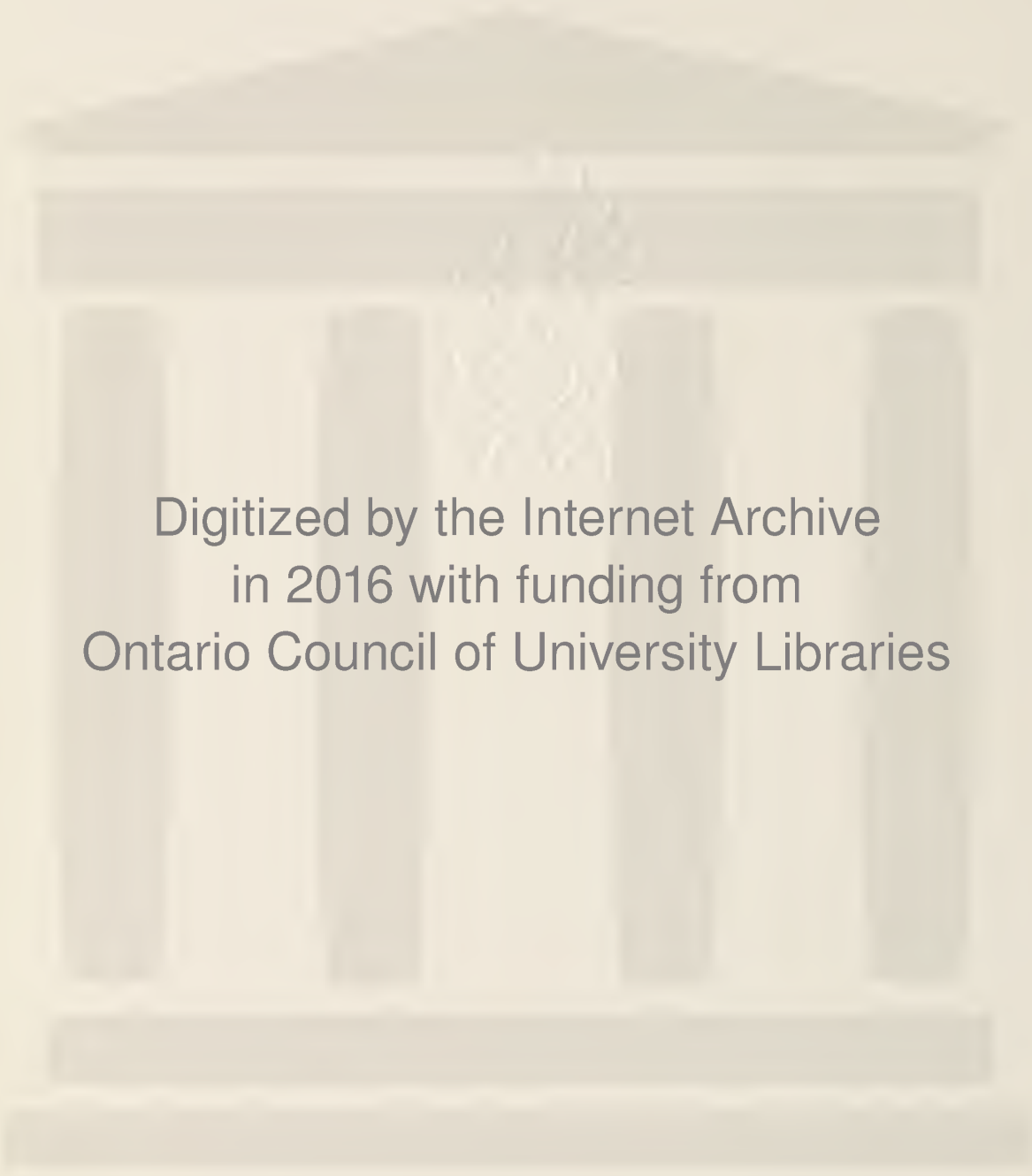
The Ombudsman | Ontario



Ombudsman Ontario

Annual Report 1983-84

Volume II



INTRODUCTION

Volume II is devoted entirely to detailed summaries of cases where the recommendation of the Ombudsman was denied by the governmental organization.

Tables of recommendations outstanding from previous reports are included as appendices.

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DETAILED SUMMARY NO. 1

The complainant contacted the Office of the Ombudsman complaining that the Ministry of Correctional Services had failed to take responsibility for property damage caused by inmates under the Ministry's control. These inmates were assigned to serve terms of imprisonment at one of the Ministry's open camp settings.

The complainant stated that on June 28, 1981, two inmates broke into his cottage, attacked him, and stole or damaged personal property items. He stated that although the inmates had done violent acts in the past, they were nonetheless placed in the open camp with little or no supervision. He stated that, during their trial on criminal charges arising from the June 1981 incident, the inmates admitted to drinking liquor at the camp the night before.

The complainant stated that although another governmental organization awarded him compensation for his personal injuries, he felt that the Ministry should accept liability for his property losses and other costs, which were not within the scope of the other organization and reimburse him.

In May 1982, the Ombudsman notified the Ministry of his intention to investigate this matter and soon thereafter a response was received from the Ministry. The Ministry advised that it did not support the contention that the inmates at the camp received little or no supervision and took the position that the staffing patterns at the camp are satisfactory. The Ministry also had no evidence to support the complainant's allegation that the two inmates were drinking liquor at the camp on the night before the break in. It was the Ministry's position that it does not have the mechanism to directly compensate individuals who suffer losses of the sort sustained by the complainant; however, the Ministry indicated that it does maintain general third party liability insurance through policies carried by another organization of the provincial government. At that time, the Ministry was awaiting information from the insurers.

Our investigation included a review of the criminal and institutional profiles of the two inmates. This review revealed that one inmate has a ten-year history of increasingly serious criminal offences, including assaults on police officers and other assaults causing bodily harm. He violated parole conditions in 1974 and 1981, was unlawfully at large in 1978 and had failed to comply with conditions of other undertakings. He was said to have an alcohol and drug problem. The other inmate had a shorter history of less serious criminal offences. He had once escaped custody in 1977. With respect to the sentence they were serving, our investigation revealed that after sentencing, they were both classified to a correctional centre which is designated as a high medium security institution. While at the correctional centre, they applied for a transfer to the camp. As both men had maintained acceptable levels of conduct at the local jails prior to sentencing as well as at the correctional centre and as they both had short sentences left to serve, their applications were approved.

Our investigator's on site investigation at the camp revealed that staff members maintained the level of security required for a minimum security camp setting on June 27 and 28, 1981. Up until 24:00 hours on June 27, 1981, routine security checks indicated that all was in order at the camp. At 01:00 hours on June 28, 1981, a patrolling correctional officer discovered that the beds occupied

by the inmates in question were "dummied". Court evidence indicated that on June 27, 1981, one of the inmates had a visit from two relatives who "planted" two twenty-six ounce bottles of liquor in the vicinity of the camp. When the two inmates left the camp, they apparently retrieved and consumed the alcohol. Next, they broke into an unoccupied dwelling near the camp and obtained more alcohol. Then they went to the complainant's cottage and were surprised to find it occupied by the complainant. They attacked and robbed him and damaged items of his personal property. The complainant estimates his property loss or damage to be in the vicinity of one thousand dollars. On June 28, 1981, the inmates were arrested and placed in custody.

On July 9, 1981, the Minister of Correctional Services wrote a letter to the complainant expressing regret and concern over the incident. The Minister explained the selection process for and the philosophy behind the program at the camp and the factors which led his staff members to believe that the inmates were appropriate for the camp program. The Minister advised the complainant of the procedure for seeking financial compensation through another provincial governmental organization. The complainant made a claim but compensation was awarded for his personal injuries only.

On July 28, 1981, at their joint trial, the inmates pleaded guilty to the criminal charges arising from the incident on June 27-28, 1981.

On October 7, 1981, the complainant wrote to the Minister stating that no one had taken responsibility for his stolen property and inquired about how he was to recover the same. On October 29, 1981, the Minister replied to the complainant. In his letter, the Minister described the security precautions taken at the camp but did not address the complainant's inquiries regarding responsibility for his stolen property.

On the basis of the investigation conducted, the Ombudsman came to the possible conclusion that the Ministry had made an unreasonable omission in failing to compensate the complainant for his property losses or damage. Accordingly, he advised the Ministry of his tentative recommendation that the Ministry rectify its omission by compensating the complainant.

In the Ministry's response, it took the position that liability in such matters is within the discretion of the Ministry's insurers and the complainant ought to have made a claim before such became statute barred. Alternatively, the Ministry felt that the complainant could have made a claim to his own insurance company. The Ministry did not wish to establish a precedent for compensation which could prejudice insurance coverage in future claims.

Furthermore the Ministry felt that (1) it would be impossible to arrive at a fair assessment of property damage or loss due to the length of time that elapsed since the damage or loss occurred; (2) the camp does not present an unusual risk to the community; and (3) the complainant is the only person in the local community who has been the victim of an assault by inmates of the camp.

Finally, he stated that a review of the case law reveals that the Ministry would be liable for damages in the event that negligence was proven. However, there should not be liability merely because unfortunate consequences followed the decision made by a person acting within his discretionary powers.

After considering all the facts of the complainant's case including the Ministry's submissions, the Ombudsman concluded pursuant to section 22(1)(b) of the Ombudsman Act that the Ministry had made an unreasonable omission in failing to compensate the complainant for his property losses or damage.

The complainant advised this Office that, of the property losses and damages he sustained, only his automobile was covered by insurance. Furthermore, during the complainant's communications with the Ministry which were within the statutory limitation period, he was not advised that he could make a claim to the Ministry's insurers.

The Ombudsman's opinion that the Ministry ought to accept responsibility for the complainant's property losses or damage was based on the principle that if the Ministry sees fit to assume the significant risk of assigning inmates who meet the classification criteria for the high medium security correctional centre to the open setting of the camp, the Ministry ought to accept responsibility in the event of a bad risk. Accordingly, he recommended, pursuant to section 22(3)(b) of the Ombudsman Act, that the Ministry of Correctional Services rectify the omission made in the complainant's case by assessing his losses and damages at his cottage and either effecting repairs to his satisfaction, using the Ministry's supplies and services, or reimbursing him for any substantiated repair and replacement costs.

Soon thereafter, the Ministry advised the Ombudsman that the Ministry did not concur with the Ombudsman's decision and therefore the Ministry would not give any effect to the Ombudsman's recommendation. The decision was based on the following factors:

Firstly, the Ministry took the position that the camp does not pose an unusual risk to the community as evidenced by the fact that in the last few years, of all escape attempts, the complainant's case was the only incidence where a local community member was assaulted.

Secondly, the Deputy Minister pointed out that it was open to the complainant to initiate a civil action to recover compensation for his property damage from the Ministry of Correctional Services within the six-month limitation period afforded by section 11 of the Public Authorities Protection Act. It was also open to the complainant under the provisions of section 653 of the Criminal Code to make an application at the inmate's criminal trial for compensation for loss or damage to his property. The Ministry took the position that his failure to do so does not imply Ministry responsibility.

Thirdly, the Ministry has denied and continues to deny negligence in relation to his case. The Ministry has taken the position that in the absence of negligence, the Ministry cannot be held responsible for any property damage caused by the escaped inmates. The Deputy Minister was of the view that payment at this time would be unfair to both the Ministry and the general public, in the sense that the complainant would be placed in a preferred position of not having to comply with the limitation provisions of the Public Authorities Protection Act, in order to receive compensation from the Ministry.

After considering the Ministry's response, the Ombudsman determined that it was not an adequate or appropriate response to his recommendation. On November 28, 1983, pursuant to section 22(4) and section 22(5) of the Ombudsman Act, the

Premier was informed of the results of the Ombudsman's investigation. The complainant and the Ministry were also notified of the results of the investigation, and the file was closed.

DETAILED SUMMARY NO. 2

On September 9, 1982, the Office of the Ombudsman received a letter from the complainant, at that time an inmate at an Ontario jail. In his correspondence, the complainant complained that his Temporary Absence Pass (TAP) had been improperly suspended and, because he could not attend work, his employer terminated his employment.

On September 30, 1982, the complainant was interviewed by a member of my investigative staff. The complainant was advised to bring his concern to the attention of the Superintendent of the jail. It was suggested to the complainant that he contact our Office again and request an investigation if the Superintendent could not satisfactorily resolve his complaint.

On October 19, 1982, the complainant again contacted the Office of the Ombudsman and requested an investigation. On October 22, 1982, the Superintendent was informed, pursuant to section 19(1) of the Ombudsman Act, of this Office's intent to investigate the complaint, and shortly thereafter an investigation was commenced.

When the Regional Director responsible for the jail was informed of our intention to investigate, he requested that the Inspections and Investigations Branch of the Ministry of Correctional Services be allowed to conduct an internal investigation first. This Office's investigation was held in abeyance pending the completion of the Ministry's inquiries.

The result of the Ministry's investigation was received at this Office on January 7, 1983. The investigation concluded that the complaint was unfounded. The Ombudsman noted the complainant was not interviewed and none of the Ministry's findings were presented by the Ministry to the complainant for his response. Our investigator discussed the results of the Ministry's investigation with the complainant on January 26, 1983. The complainant disagreed with various findings in that investigation and as a result, our investigator continued this Office's investigation.

During this investigation, information was obtained in personal interviews with the complainant, the jail Superintendent, the Regional Director, an officer of the Inspections and Investigations Branch, the Deputy Superintendent of the jail, the jail TAP Coordinator, a Correctional Officer at the jail, the Director and a counsellor of a local Community Resource Centre, and two of the complainant's former employers.

In addition, information was obtained through a review of the complainant's institutional file and the results of the investigation conducted by the Inspections and Investigations Branch of the Ministry of Correctional Services.

Our investigation revealed the following information.

On February 24, 1982, the complainant was hired as an apprentice boat builder at the rate of $3.50 per hour. The employer primarily manufactures sailboats; however, other fibreglass items are produced when requested.

On June 3, 1982 the complainant was admitted to the jail to serve a six-month term of incarceration. The judge who sentenced the complainant recommended that he be granted a Temporary Absence Pass in order to attend work each day. Before his admission to the jail, the complainant informed his employer that he would return to work as soon as the jail authorities could arrange his TAP. The jail authorities confirmed his employment and commencing on June 15, 1982, the complainant left the jail in order to attend work each day pursuant to a TAP.

On July 16, 1982 the complainant was transferred to a local community resource centre (CRC). Both the complainant and the Administrator of the CRC agreed later that the complainant did not adjust well to the CRC's routine.

The complainant stated that after work on July 16, 1982 he was immediately taken from the jail to the centre. After supper, he was instructed to help clean the kitchen which was infested with ants. He complained that he had worked all day and wanted to go to bed in order to get up for work at 7:00 a.m. the next morning. However, he was required to work until approximately midnight at that task.

The complainant also came into conflict over his assigned duty to clean the ashtrays at 11:15 each evening. He claims that he did not object to the chore, but did object to staying up until 11:15 in order to do it. He requested, but was not allowed, to do it in the morning before he went to work.

The Administrators at the CRC also curtailed his expense money from approximately $20 per day to $4 per day. The complainant complained that this limitation improperly interfered with his lifestyle. The Director of the CRC contacted the TAP Coordinator at the jail in order to verify the complainant's hours of work and the amount of money he was allowed to have. During that conversation the Director told the TAP Coordinator that the complainant was not adjusting to the house routine and that he had objected to doing his share of the work.

The incident which triggered the complainant's return to the jail occurred on July 20, 1982. As is normal procedure with any new resident in this CRC, an interview had been arranged between the complainant's parents and a counsellor of the house. The purpose of this meeting was to gather information about the inmate and to allow the inmate's family an opportunity to view the house and become aware of the rules that the inmate must adhere to. This interview is usually conducted in the absence of the inmate because the family will often talk more freely under those conditions.

During the evening of July 20, 1982, the counsellor was conducting the interview with the complainant's parents when the complainant walked into the room. The counsellor asked the complainant to leave and he did. According to the counsellor, a short while later, he reappeared and made some comments regarding the childish atmosphere of the house. He eventually left and the interview resumed. Later the complainant again entered the room and stayed until the end of the meeting.

Because of this and previous incidents, it was apparent to the counsellor that the complainant did not enjoy the atmosphere at the CRC. The counsellor therefore approached him and asked him whether he was having problems adjusting to house routine. The complainant replied that the house was childish and amounted to a large babysitting institution. The complainant indicated his desire to return to the jail. The counsellor had the complainant indicate his desire in writing and then contacted the jail and arranged for the complainant to be returned that evening.

On the following day, Wednesday, July 21, the Deputy Superintendent of the jail decided to suspend the complainant's TAP. The decision to suspend or revoke the pass would normally have been made by the Superintendent. However, the Superintendent was, at that time, on vacation.

According to the Deputy Superintendent, he decided to suspend the complainant's TAP pending an investigation into the circumstances which led to the complainant's return to the jail. The Deputy Superintendent states that he instructed the Acting TAP Coordinator to contact the complainant's employer and inform him that the complainant had been returned from the CRC to the jail and that as a result, he would not be available for work until the matter was investigated. The TAP Coordinator also informed the complainant that his TAP was suspended until the Superintendent returned from vacation and was available to review the matter.

The Ministry of Correctional Services Manual of Standards and Procedures, Section B-4, page 25 states that the Superintendent or his designate may for reasonable cause suspend a temporary absence pass at any time. The Manual states that "details and circumstances surrounding the suspension shall be detailed in writing and certified and dated per the format prescribed in the individual Authorization Permit".

The Permit which authorized the complainant's temporary absence, however, did not indicate whether any disposition was made by the Superintendent or his designate. In addition, no occurrence report was completed which would indicate the nature of the Deputy Superintendent's decision or his reasons therefor.

According to the TAP Coordinator, when she informed the employer that the complainant would not be immediately available for work, the employer stated that he would contact the jail if and when the complainant was required. The employer did not contact the jail again. No investigation was conducted and the matter was simply left for the Superintendent to consider upon his return from vacation the following Monday.

According to the employer, the complainant was an average employee. At the time that his pass was suspended, the complainant had just commenced a job manufacturing fibreglass snowblower hoods. The contract called for 50 hoods and the complainant had been trained specifically for that job. The complainant could make three hoods per day and at that rate the contract would have kept him occupied for at least two weeks.

According to the employer, he was informed by someone at the jail (whose identity he could not recall) that the complainant would not be returning to work because his pass was suspended. The person calling would not predict when the

complainant would return to work. The employer stated that the contract that the complainant was working on had a definite deadline. There were two or three other employees who were capable of doing the same job. When it was apparent that the complainant would not return, an employee was taken off a job with a less immediate deadline and instructed to complete the contract. Therefore it was not necessary to replace the complainant immediately. However, when the complainant did not reappear for work for five days, his employment was terminated. The Record of Termination issued by the employer on July 29 indicates the reason for termination as "the complainant was on TAP from the jail, went up for parole - TAP was not approved". This statement, written by a secretary who is no longer with the employer, is obviously inaccurate and probably reflects the secretary's confusion over the complainant's legal status.

The employer has stated that he could have kept the complainant busy with other work after the snowblower hood job was completed. Before the complainant's TAP was suspended, the employer had no plans to terminate the complainant's employment. The complainant's average weekly net pay calculated from the time he was hired until the date of his termination was $134.64.

On Monday, July 26, 1982, the Superintendent of the jail returned from his vacation. Upon review of the complainant's circumstances, he decided on Tuesday, July 27, 1982 that the TAP should be reinstated. The TAP Coordinator was instructed to contact the employer and inquire as to whether the complainant's job was still available. The Coordinator was informed however, that the complainant's employment had been terminated. The complainant was later offered a TAP which permitted him to leave the institution each day to work at a non-paying community service job. The complainant accepted and completed the remainder of his sentence on the community service program. He was released from the jail on October 4, 1982.

Since it appeared to the Ombudsman that there were sufficient grounds to make a recommendation that would adversely affect the Ministry and the Deputy Superintendent, letters detailing the results of the investigation and the possible conclusion and recommendation were sent on August 9, 1983 to the Deputy Minister of Correctional Services and the Deputy Superintendent, pursuant to section 19(3) of the Ombudsman Act. Both the Deputy Minister and the Deputy Superintendent were given an opportunity to respond.

According to the Deputy Minister, the complainant failed to accept the limits and controls imposed upon him at the CRC and it was appropriate to return him to the jail and suspend his TAP pending a further investigation. According to the Deputy Minister's information, the employer was contacted and he indicated that he would contact the institution if the complainant was needed. Thus, in his opinion, there was no need to complete the investigation until the employer indicated he required the complainant's services.

The Deputy Superintendent claimed that although in the Superintendent's absence he was in charge of the institution, he had been told on an earlier occasion that he had no authority to make important decisions, including revoking or reinstating a TAP. According to the Deputy Superintendent, the Superintendent had clearly told him that a decision such as this should be deferred until his return, and in so doing, he was acting in accordance with the Superintendent's practice.

The practice at the jail was discussed with the Superintendent, the present Deputy Superintendent of the jail, and the present TAP Coordinator at the jail. The Superintendent stated that the practice of the jail when he is to be absent for a significant length of time is to inform the Regional Director in writing of the absence and the name of the person who will be in charge of the institution. Such a letter was sent to the Regional Director indicating that the Deputy Superintendent would be in charge of the jail while the Superintendent was on vacation from July 19 to July 25, 1982. All three agreed that the current practice is that in the Superintendent's absence, the Deputy Superintendent has all the power and authority of the Superintendent, including the authority to reinstate a suspended TAP. The Superintendent also stated that this was the practice at the time of the incident complained of.

From the information available, it was not possible to determine with certainty if it was actually the Superintendent's practice to restrict the powers of the Deputy Superintendent regarding TAPs at the time of the complainant's return to the jail from the CRC. It appears, however, that this is not the Superintendent's present practice. It was the Ombudsman's opinion that whether the delay in the complainant's case stemmed from the actions of the Superintendent or the then Deputy Superintendent was aside from the fact that an unreasonable delay occurred and caused the complainant to lose his employment.

The Ombudsman concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the decision on July 21, 1982 to suspend the complainant's TAP and delay consideration of the matter until the Superintendent's return on July 27, 1982 was unreasonable in view of the following facts:

(a) Since it was reasonably foreseeable that the complainant's employment would be jeopardized by suspension of his TAP, there was an obligation to investigate without delay the circumstances surrounding the complainant's return to the jail from the CRC.

(b) No investigation was done in order to determine whether the continued suspension was justified.

(c) The suspension resulted in the loss of the complainant's employment.

In view of this conclusion, the Ombudsman recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Ministry of Correctional Services compensate the complainant for the loss of wages he incurred from July 21, 1982, the date of the suspension of the TAP, until October 4, 1982, the date of the complainant's release. Since this period amounted to ten and one-half weeks, and the complainant's average weekly net pay was $134.64, the Ombudsman recommended that the Ministry of Correctional Services compensate the complainant in the amount of $1,413.72.

On February 15, 1983, the Deputy Minister advised the Ombudsman that the Ministry did not concur with the Ombudsman's decision and therefore the Ministry would not given effect to the Ombudsman's recommendation.

It was the Ministry's position that the staff of the local jail could not reasonably foresee that the complainant's employment was being jeopardized by the temporary suspension of his TAP. Moreover, it was the Ministry's position

that while there was a delay in the completion of the investigation in the temporary absence suspension, it could not accept the Ombudsman's position that this act in itself resulted in the loss of employment.

The Ministry also noted that the complainant's removal from the CRC, which resulted in the supervision of his TAP, was due to his request to be returned to the local jail. According to the Ministry, the suspension was for legitimate reasons, as there were clearly circumstances surrounding his behaviour in the CRC which required investigation.

Finally, according to the Ministry, this suspension and subsequent actions of the institutional staff were strictly in accordance with the Ministry of Correctional Services Act and the regulations thereunder.

After considering the Ministry's response, the Ombudsman determined that it was not an adequate or appropriate response to his recommendation. On March 30, 1984, pursuant to section 22(4) and section 22(5) of the Ombudsman Act, the Premier was informed of the results of the Ombudsman's investigation.

The Ministry and the complainant were also notified of the results of our investigation.

DETAILED SUMMARY NO. 3

On May 11, 1981, the Ombudsman received a complaint about the adequacy of advice given to the complainant relating to the transfer of his pension credits.

The governmental organization affected was the Public Service Superannuation Board (the Board) which was duly notified of the Ombudsman's intention to investigate. An investigation was carried out and the following information was established.

From 1958 the complainant was a County Jail employee contributing to the Public Service Superannuation Fund (PSSF). At that time, the PSSF pension was calculated on the average of the employee's highest three years of earnings. In 1966, the complainant was offered a new position with the County which required him to change pension plan from the PSSF to the Ontario Municipal Employees Retirement System (OMERS). The OMERS pension, being based on the employee's career average earnings, was not then as generous as the PSSF pension.

Before the complainant accepted the new position his employer wrote on his behalf to the Director of the Pension Funds Branch, Treasury Department (now Ministry of Government Services) asking if in these circumstances he could transfer his accumulated pension credits to OMERS. The Director replied by setting out the alternatives and suggesting that the name of the employee be given so that "we could supply information with respect to the advisability of such a transfer". The complainant's name was duly supplied by his employer who wrote that the County did "not wish to do anything that would affect his pension credits with the Superannuation Fund". The Director responded saying that the complainant had the choice of taking a cash refund or transferring his pension credits to OMERS. The Director ended his letter with the words: "It would appear that [the

complainant] would be well advised to request a transfer of pension credits ... rather than elect a cash refund...."

The complainant then accepted the new position and asked for his pension credits to be transferred to OMERS. As a result he lost: (i) the contributions his employer made which were not transferred to OMERS; and (ii) the right to a pension calculated on his average highest three years of earnings.

During the course of the investigation the Ombudsman advised the Board, the Ministry of Government Services and the Director that there appeared to be sufficient grounds for making an adverse report. The question was whether, in the special circumstances of this case, the Director had unreasonably failed to give the complainant complete advice about the consequences of transferring from the PSSF to OMERS. The Ombudsman acknowledged that a person in the position of the Director should not be required or expected to give advice. However, it appeared that the Director had specifically offered to "supply information with respect to the advisability of such a transfer". The employer's reply could be interpreted as an acceptance of that offer. It also seemed to the Ombudsman that, after having received the Director's advice, the complainant acted on it to his detriment. By not informing the complainant of what he might loose if he terminated his membership in the PSSF, the Director's advice appeared to be incomplete.

Representations were made to the Ombudsman by the Board, the Ministry of Government Services and the Director. The main arguments were that the Director did not offer counsel on the advisability of accepting or refusing the promotion. In the circumstances this interpretation of the inquiry made to him was reasonable. He was not asked for a detailed analysis of the two pension plans. Rather, he limited himself to "the general consequences of accepting the promotion". Furthermore, the advice he gave was to the complainant's benefit: transfer was preferable to taking a cash refund, particularly as the OMERS benefits have improved in recent years.

At the conclusion of the investigation, the Ombudsman formed the opinion that, in these particular circumstances, the Director had unreasonably failed to supply complete information with respect to the consequences of the complainant's transfer of pension credits to OMERS. His recommendation, pursuant to section 22(3)(g) of the Ombudsman Act was that the complainant be paid reasonable compensation for his loss by either the Ministry of Government Services or the Board.

The Chairman of the Board subsequently advised the Ombudsman that she disagreed with his conclusion and could not give effect to his recommendation. "Owing to the uncertainty as to what [the complainant's] career progression might have been had he not accepted the promotion, it is not possible to speculate as to the dollar amount of pension benefits which he would have been entitled to in comparison to his entitlement under the OMER System." The Chairman also advised that there was no authority allowing either the Ministry or the Board to make such an ex gratia payment. On June 30, 1983, the Ombudsman, acting in terms of section 22(4) of the Ombudsman Act, sent a copy of his report and recommendation to the Premier. The file was closed thereafter.

DETAILED SUMMARY NO. 4

A complaint was made to the Ombudsman on November 13, 1979 about a decision of the Ontario Northland Transportation Commission (the Commission) concerning the complainant's pension entitlement.

After the Commission was notified of the Ombudsman's intention to investigate an investigation was carried out, establishing the following information.

The complainant began working for a transportation company in 1941. The company provided for its management staff a "retirement policy" under which lump sum payments were made to retiring employees according to age and length of service. Employees were not required to pay contributions.

In 1973, after the complainant had been working for thirty-two years, the company was acquired by the Commission. Two years later, the management staff (including the complainant) were permitted to join and begin making contributions to the Ontario Northland Pension plan. At the same time, the Commission gave a commitment to the management staff that they would not receive less under the Ontario Northland plan than under the company's retirement policy.

In 1979, the complainant retired suffering from Huntington's disease which prevented him from working any longer. He was 56 years of age at the time and had worked for the company for a total of thirty-two years, five years of which were with the Commission.

On his retirement the Commission paid him:

(1) a lump sum payment equal to 3/4 of his 1979 earnings ($24,318) under the company's retirement policy; and

(2) a refund of the contributions he had paid to the Ontario Northland Pension plan, with interest at 4% ($6,004.52).

The complainant claimed that rather than having his contributions refunded to him, he should have been paid a pension from the Ontario Northland plan on the basis that his age and years of service were not less than 85. The Commission, however, refused; its view was that only his service in the five year period following the Commission's acquisition of the company could be counted. On this interpretation, the complainant's service and age did not total 85.

During the course of the investigation, the Ombudsman advised the Commission that there appeared to be sufficient grounds for making a report adverse to it. The question was whether the Commission had failed to provide for longstanding employees who might be forced to retire early because of ill health. It seemed to the Ombudsman that such employees were being prevented from qualifying for the same benefits as other Commission employees with the same length of service. The Ombudsman was influenced by section 29 of the Pension Benefits Act. The intention underlying this section appeared to be that, for the purpose of qualifying for a pension, continuity of service should not be artificially broken by an employment take over. The section did not apply to the complainant's circumstances because the company retirement policy was not a

pension plan as defined by the Act. However, the purpose of the company retirement policy, and likewise a pension plan proper, was clearly to give a benefit after long service. It therefore seemed equitable to the Ombudsman that the Commission should have given effect to section 29 and made provision in its plan for the complainant and other longstanding company employees to count their company service in order to qualify for a pension.

The Commission submitted representations to the Ombudsman arguing that its authority to make pension payments was derived from the regulations governing the Ontario Northland Pension plan. Since the complainant was not qualified under the regulations, the Commission was not authorized to pay him a pension. The Commission argued further that its actions in refunding the complainant's contributions with 4% interest was consistent with the practice of other pension plans. Finally, the Commission felt its commitment in 1975 meant that the company retirement policy would become redundant as soon as company personnel qualified under the Ontario Northland plan.

At the conclusion of the investigation, the Ombudsman formed the opinion that the Commission had unreasonably failed to make proper provision in its plan for employees in the complainant's circumstances. His recommendation under section 22(3)(g) of the Ombudsman Act was that the Commission pay the complainant a lump sum representing the pension benefits he would have received from the date of his retirement to the present time (approximately $95 a month) as set off against the sum of $6,004.52 (being the amount of his contributions, plus 4% interest, refunded to him in 1979) and that there after the complainant should continue to receive this monthly pension.

The Commission subsequently advised the Ombudsman that it did not intend to implement his recommendation. On June 7, 1983, the Ombudsman, acting in terms of section 22(4) of the Ombudsman Act, sent a copy of his report and recommendation to the Premier. The file was closed thereafter.

DETAILED SUMMARY NO. 5

The complainant first complained to our Office at private hearings in September of 1981. He confirmed his complaint to our Office by letter dated November 6, 1981. He complained of a short-fall in his pension entitlement resulting from transfers of his employment from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities and back again to the Ministry of Agriculture and Food.

By letters dated January 5, 1982, the Chairman of the Public Service Superannuation Board and the Deputy Minister of Agriculture and Food, were informed by the Ombudsman of his intent to investigate this complaint. The results of those investigations were the subjects of separate reports.

On May 14, 1982, the Ombudsman wrote to inform the Minister of Colleges and Universities of our intention to investigate the complaint against that Ministry. In that letter, the complainant's contentions were outlined as follows:

In 1946, the complainant joined the staff of the Ontario Veterinary College (OVC) of the Department of Agriculture and Food as a probationary employee. His appointment became permanent in January, 1947, at which time he began contributing to the Public Service Superannuation Fund (PSSF). He contributed to the PSSF until 1965, when OVC was incorporated into a newly-formed University and he was transferred from the public service to employment with the University.

Since he was no longer classified as a public servant, the complainant was required to terminate his membership in the PSSF and join the University's pension plan. His pension credits in the PSSF were transferred to the University pension plan.

In June, 1971, the complainant was transferred back to the public service when the Ontario government agreed to take over diagnostic services from the University. The complainant again transferred his pension credits, this time from the University plan to the PSSF.

While the complainant was in the employ of the University, on April 10, 1969, he received a memorandum addressed to all faculty and staff members from the Director of Personnel. In this memorandum, the following statement regarding pension benefits was quoted:

> 'In no event will the sum of past service pension and future service pension as above provided, payable at normal or later retirement, be left on that pension that would have been paid for the same period of service under the public service plan as in effect that your retirement under this plan, calculated on the assumption that your salary in each year on and after September 1, 1965, is the greater of (i) the salary you would have received from public service if your salary had progressed normally within the salary classification for your position on August 31, 1965; and (ii) your salary from public service on August 31, 1965 multiplied by the ratios that the consumer price index for the year in question bears to the same index for the year 1965.'

In May, 1972, the complainant received a statement from the Pension Funds Branch of the Department of Treasury and Economics indicating that in order for him to have a continuous pension from January 2, 1947, he must make up a deficit of payment of $2,774.79. The short-fall resulted from the fact that the University paid only 4% towards his pension during his six years of employment with them rather than the 6% the Ontario government had been paying. The complainant has not yet paid this difference. He contacted officials at the University, in the Ministry of Government Services, and in the Ministry of Agriculture and Food about the requirement to make up the difference, but his attempts to resolve the problem have not been successful.

In 1977, well after the complainant had been transferred back to the public service, his former colleagues in the OVC, who were taken over in 1965 but who were not affected by the second transfer in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the provincial government agreed to

compensate the pension loss suffered by about 570 university staff involved in the first takeover in 1965. The settlement did not cover the complainant and his colleagues in diagnostic services who were the subject of the second transfer, although they too were taken over in 1965.

Like his former colleagues, the complainant claims that, when he was taken over in 1965, he was assured that he would not be worse off than he would have been had he stayed in the public service. The Ministry of Colleges and Universities, he alleges, by settling the claim in 1977, has apparently accepted that such assurances were given, and accepted responsibility for them.

The complainant states that his loss is not only the short-fall in employer contributions to his pension, which he has been asked to make up, but he has also lost the right to a pension calculated on the average of his best three years of earnings. This he would have been entitled to had it not been for the take-over in 1965. The PSSF formula changed at the end of the same year, 1965, and a less advantageous pension, based on the average of the best five years' earnings was offered to all those entering the public service after January 1, 1966. The 1971 transfer meant that the complainant was deemed to have re-entered the public service at that date, and thus lost the right to a pension calculated on the basis of his best three years' earnings.

The complainant thus contends that his loss was the responsibility of the Ministry of Colleges and Universities and he should be compensated in a like manner to his former colleagues at OVC. He claims that any differentiation of his status from that of the University employees who were not transferred back to the public service is unreasonable and improperly discriminatory. Further he contends that the unreasonable acts of the Ministry have denied him a pension calculated on the average of his best three years of earnings for which he should be compensated.

The Ombudsman also asked the Minister of Colleges and Universities whether she was prepared to give a statement of her Ministry's position on the complaint. By letter dated June 23, 1982, the Director, Personnel Branch, Ministry of Colleges and Universities, responded on behalf of that Ministry. Our investigator, who had been investigating the complaints as against the Ministry of Agriculture and Food and the Public Service Superannuation Board, then proceeded with this aspect of the investigation as well.

In the course of the investigation, the following individuals were contacted: the Director, Personnel Branch, Ministry of Colleges and Universities; the Secretary, Public Service Superannuation Board; the Director, University Relations Branch, Ministry of Colleges and Universities; the University Affairs Officer, Ministry of Colleges and Universities; the Benefits Manager, Ministry of Agriculture and Food; and the Technical Coordinator, Policy and Executive Benefits Section, Employee Benefits and Data Services Branch, Ministry of Government Services. Documents supplied by each of the Ministries, by the Public Service Superannuation Board, and by the complainant were reviewed, and meetings were held with various Ministry personnel. As a result of the investigation, the following information was obtained.

In 1946, the complainant joined the staff of the Ontario Veterinary College (OVC) of the Department of Agriculture and Food, as a probationary employee. His appointment became permanent in January of 1947, at which time he began contributing to the Public Service Superannuation Fund (PSSF). In 1965, when OVC was incorporated into a newly-formed University, the complainant was transferred from the public service to employment with the University. Since he was no longer classified as a public servant, he was required to terminate his membership in the PSSF and join the University's pension plan. His pension credits in the PSSF were transferred to the University pension plan.

In June, 1971, the complainant was transferred back to the public service when the Ontario government agreed to take over the diagnostic services from the University. The complainant again transferred his pension credits, this time from the University plan to the PSSF.

On April 10, 1969, the complainant, then in the employ of the University, received a memorandum from the Director of Personnel, which was quoted in the letter to the Minister of May 31, 1982.

On April 30, 1971, prior to being transferred back to public service, the complainant attended a meeting concerning the proposed transfer. The meeting was attended by an officer for the University and a member of the Personnel Branch of the Ministry of Agriculture and Food. The complainant states that at this meeting he was assured that his pension would be transferred back to the public service at no cost to himself and that the pension would be continuous from his initial contributions to the public service started on January 2, 1947 up to June 30, 1971, upon which date he would be returning to the public service.

In May, 1972, the complainant received a statement from the Pension Funds Branch of the Department of Treasury and Economics indicating that, in order for him to have a continuous pension from January 2, 1947, he must make up a deficit payment of $2774.79. This short-fall resulted from the fact that the University paid only 4% towards his pension during his six years of employment with them rather than the 6% the Ontario government had been paying. The complainant refused to pay the short-fall at that time.

In 1977, colleagues of the complainant in OVC who had been transferred to employment with the University in 1965 but not transferred back to the Ministry of Agriculture and Food in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the Ministry of Colleges and Universities agreed to compensate the pension loss suffered by about 570 university staff involved in the first takeover in 1965. The settlement, however, did not apply to the complainant and his colleagues in diagnostic services who were the subject of the second transfer, although they too were taken over in 1965.

The Director, Personnel Branch, Ministry of Colleges and Universities, by letter dated June 23, 1982, responded to the Ombudsman's letter to the Minister, stating that the complainant was an employee of the Ministry of Agriculture and Food, and that his dispute was with the interpretation of the Public Service Superannuation Fund Act. He asked that we direct our inquiries to the Public Service Superannuation Board. Our investigator contacted the Manager of Benefits Delivery, Employee Benefits Branch, Ministry of Government Services, and ascertained that, since the increases in the Canada Pension Plan, the calculation of benefits on the basis of a five year entitlement for those who do

not retire until the age of 65 is now better than a calculation on the basis of three year entitlement. Our investigator therefore proceeded to investigate that aspect of the complaint which dealt with the short-fall in University contributions, and the settlement made by the Ministry of Colleges and Universities on behalf of other employees affected by the transfer.

On July 2, 1982, an Assistant Director of Investigations with our Office contacted the Director, Personnel Branch, Ministry of Colleges and Universities, in an attempt to further ascertain his Ministry's position with the differential treatment received by those employees who were and those who were not transferred back to the public service. A meeting was then arranged between our investigator and the University Affairs Officer, Ministry of Colleges and Universities. At that meeting, on August 10, 1982, the officer acknowledged that a fund of approximately $250,000 per year is paid directly to the University by the Ministry of Colleges and Universities to provide a pension supplement for those employees of the University who suffered pension loss in the 1965 transfer. It was suggested that there might be some way of modifying the agreement between the Ministry of Colleges and Universities and the University so that the complainant would also be eligible for such a pension supplement. On September 8, 1982, our investigator was informed by a Technical Coordinator, Ministry of Government Services, of the nature of the supplemental pension fund established by the Ministry of Colleges and Universities for the benefit of the transferred employees of the University. The fund guaranteed those employees that their pension would be as good or better than that which they would have had had they stayed in the public service throughout.

Our investigator also obtained from the Technical Coordinator a list of all people who had been affected by the transfer to and from the University, and the amounts that they had been required to pay to make up the short-fall in pension contributions by the University.

During telephone conversations of January 21 and February 3, 1983, our investigator and the University Affairs Officer discussed possibilities of including the complainant in the University's extra payment plan. In a letter dated January 31, 1983, our investigator proposed alternative solutions to the matter. She suggested that the complainant's situation could be rectified either with a lump sum payment representing pension benefits he had lost, or, in the alternative, a possible monthly supplement to his pension upon retirement.

In a responding letter dated February 7, 1983, the University Affairs Officer outlined the Ministry's position as follows:

> As explained in your letters, these [employees] on their return to OMAF were requested by the Public Service Superannuation Fund to pay individually specified amounts to prevent potential pension loss. For present purposes, they fall into two categories:
>
> A. Those who complied with the request, and
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> B. Those who did not
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> Those in category A (eight persons) are out of pocket to the extent of the amounts they paid plus interest to date. The loss to those in category B (three persons) is measured by the pension benefits they have

lost by not making the required payment in 1971. You mention a single lump sum settlement as one possible solution for both types. This would be the preferred option from the point of view of the Ministry of Colleges and Universities.

On May 31, 1983, the University Affairs Officer telephoned our investigator and read her a draft letter of the proposed settlement. He stated that employees who had paid amounts which they should not have had to pay to have their pension benefits retained should have these amounts refunded. As for employees who refused to pay the adjustment, such as the complainant, they would receive, upon retirement, equivalent pensions to those they would have received had they paid. The difference between the pension they would get now and that they should have received would be made up yearly by the University from funds provided especially for this purpose by the Ministry.

Subsequent to this conversation, a letter dated June 13, 1983 was forwarded by the University Affairs Officer, which reflected a dramatic change in the Ministry's position. This letter indicated that the Ministry was no longer willing to consider compensation for the complainant. The University Affairs Officer now contended that the arrangement by the Ministry of Colleges and Universities to compensate former public service employees was undertaken to assist those who retired as University employees. He further contended that since it was the Ministry of Agriculture and Food which made the initial guarantee to the complainant, and since the complainant will retire as an employee of the Ministry of Agriculture and Food, it is that Ministry which should honour its original guarantee.

At this point in the investigation, having reviewed the information obtained from the Ministry of Colleges and Universities, the Ministry of Agriculture and Food, and the Pension Benefits Branch, the Ombudsman formed the view that it was open to him to make a report justifying the following possible conclusions and recommendations:

POSSIBLE CONCLUSION

It appeared that it might be open to the Ombudsman to conclude, pursuant to s. 22(1)(b) of the Ombudsman Act, that the Ministry of Colleges and Universities is acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

POSSIBLE RECOMMENDATION

It appeared that it might be open to the Ombudsman to recommend, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities ... make arrangements to make up the loss in the complainant's pension, once this loss could be calculated.

In support of the possible conclusion and recommendation the Ombudsman noted that the Ministry of Colleges and Universities, by entering into the agreement of December, 1977 with the ex-public-servants who at that time were

working at the University, assumed responsibility for the discrepancy that had arisen between the employees' understanding of their pension entitlement and the amounts to which they would become entitled under the University's scheme. Furthermore, he noted that the lengthy discussions with our Office on the possible inclusion of the complainant in the 1977 agreement appeared to him to further underscore the Ministry's sense of responsibility for the short-fall in pension payments which arose when the complainant was an employee at the University. He also noted that the ongoing discussions had delayed his ultimate consideration of this complaint, as it had appeared that the matter might be resolved without the necessity of a recommendation.

Pursuant to the provisions of section 19(3) of the Ombudsman Act, the Ombudsman wrote to the Ministry of Colleges and Universities, as a governmental organization which might be adversely affected by his report and recommendations, on September 15, 1983, outlining the results of his investigation to date, and his possible conclusion and recommendation, and gave the Ministry the opportunity to make representations, either in writing, in person, or by counsel. By letter dated October 19, 1983, the Minister of Colleges and Universities responded to the Ombudsman's September 15, 1983 letter.

In her response, the Minister denied that there had been any change in the Ministry's position on the matter investigated, and stated that the Ministry had never acknowledged any responsibility for this complaint. She further stated that the Ministry's only involvement was with those people initially transferred from OMAF to the University who remained in the employment of the University, and that the Ministry could not be held responsible beyond that. In support of her position, she noted the following:

> (a) When the initial transfer of staff took place in 1965 to the University, all staff affected were terminated from the employment of OMAF.
>
> (b) When the complainant, among others, returned to OMAF in 1971, [he was] terminated from the employment of the University and [was] employed by OMAF as [a] new employee.
>
> (c) When the [termination] took place referred to in (a) and (b), ... the complainant received applicable compensation as provided for under the respective termination arrangements in the manner that would apply to any other employee. In other words, [a clear separation] took place.
>
> (d) ... the complainant [was] placed as a probationary employee of OMAF on [his] return, and treated in the same manner as other new employees.
>
> (e) ... the complainant [was] offered the option of making up arrears with respect to [his] pension contributions. This is normal procedure where pension transfers are involved.
>
> (f) Memorandum to file in 1979 from [a previous] Director of Personnel at OMAF, indicates that only vacation seniority was granted to the returnees. This is attached for your information. OMAF has no record of any commitment made, regarding the transfer of the complainant's pension from the University to the public service.

(g) Reinstatement of pension credit does not affect the calculation of pension (i.e. best three years vs. best five years).

In summary, the Minister, while expressing some sympathy for the complainant, expressed her opinion that the Ministry of Colleges and Universities was not the appropriate Ministry with which to pursue the matter.

In the course of his review of the Ministry's position, the Ombudsman wrote to the Minister on November 4, 1983 asking for clarification of the "applicable compensation" mentioned by the Minister in paragraph (c) of her letter to him. By letter dated November 22, 1983, the Minister provided the Ombudsman with documents which showed details of the transfers in 1965 and 1971. None of these documents indicated that any payment in lieu of pension loss was made to the complainant on his transfer from the University to the Ministry of Agriculture and Food.

On December 7, 1983 the Ombudsman wrote to the Minister once more, asking her to consider one further point. He suggested that her Ministry had accepted responsibility for pension losses suffered by persons who transferred from the public service to the University, the very loss of which the complainant complained, and attached some documents for her consideration. One of these documents was a letter from a previous Minister of Colleges and Universities to the solicitor who acted for members of the University faculty who were attempting to clarify their pension entitlement. This letter outlined the terms on which the Ministry was prepared to provide financial assistance to former civil servants who had transferred to the University in 1965, and formed the basis of the extra-payment plan outlined above. By letter dated December 29, 1983, the Minister reiterated her position that the Ministry of Colleges and Universities was responsible only for those who remained employees of the University, and that the Ministry of Agriculture and Food should be responsible for any employees who were transferred back to that Ministry following their employment with the University.

The Ombudsman carefully reviewed the documents provided to him by the Ministry of Colleges and Universities, and considered the Minister's position on this matter. It appeared to him that, although the complainant did not remain in the employ of the University, his contention that he was guaranteed no pension loss on transfer to the University was supported by the fact that the Ministry of Colleges and Universities accepted responsibility for the losses suffered by those employees who did stay with the University. It was his understanding that the complainant worked at the same job throughout, and that his transfers from Ministry to Ministry were, in essence, paper transactions. His pension loss did not arise as a result of his ultimate transfer back to the Ministry of Agriculture and Food, but rather arose because the University paid a smaller sum into the pension fund than would have been necessary to maintain his pension benefits at the former level.

On the basis of his review, therefore, the Ombudsman concluded that, pursuant to s. 22(1)(b) of the Ombudsman Act, the Ministry of Colleges and Universities was acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

Having thus concluded, the Ombudsman recommended, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities ... make arrangements to make up the loss in the complainant's pension, once this loss could be calculated.

On March 14, 1984, the Ombudsman wrote to the Assistant Deputy Minister requesting further discussion to resolve this complaint. As no response was received prior to the end of the fiscal year, a report of this complaint was forwarded to the Premier.

DETAILED SUMMARY NO. 6

The complainant first complained to our Office by letter dated April 6, 1981. He complained of a short-fall in his pension entitlement resulting from transfers of his employment from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities and back again to the Ministry of Agriculture and Food.

By letters dated May 26, 1981, the Chairman of the Public Service Superannuation Board and the Deputy Minister of Agriculture and Food were informed by the Ombudsman of his intent to investigate this complaint. The results of these investigations are the subject of separate reports.

On May 14, 1982, the Ombudsman wrote to inform the Minister of Colleges and Universities, of our intention to investigate the complaint against that Ministry. In that letter, the complainant's contentions were outlined as follows:

> In 1950, the complainant joined the temporary staff of the Ontario Veterinary College (OVC) of the Department of Agriculture and Food. In 1952, his appointment was made permanent, at which time he began contributing to the Public Service Superannuation Fund (PSSF). The complainant retired on June 30, 1981.
>
> On two occasions during his recent career, the complainant's employment was compulsorily taken over. The first occasion was in 1965 when OVC was incorporated into a newly-formed University. The complainant was employed by the University in Diagnostic Services, and although he was deemed to be employed by the University, his salary was paid by the provincial government. This information was given to him in writing by the Dean of the University.
>
> Since he was no longer classified as a public servant, the complainant was required to terminate his membership of the PSSF and join the University pension plan. His pension credits in the PSSF were transferred to the University pension plan.
>
> The second take-over was in 1971 when some, but not all, divisions of Diagnostic Services were transferred back to the public service. The complainant again transferred his pension credits, this time from the University pension plan to the PSSF.

While the complainant was in the employ of the University, on April 10, 1969, he received a memorandum addressed to all faculty staff members from the Director of Personnel. In this memorandum, the following statement regarding pension benefits was quoted:

> In no event will the sum of past service pension and future service pension as above provided, payable as normal or later at retirement, be less than the pension that would have been paid for the same period of service under the Public Service Plan as in effect at your retirement under this plan, calculated on the assumption that your salary in each year on and after September 1, 1965 is the greater of (i) the salary you would have received from the Public Service if your salary had progressed normally within the salary classification for your position on August 31, 1965; and (ii) your salary from the Public Service on August 31, 1965 multiplied by the ratio that the Consumer Price Index for the year in question bears to the same index for the year 1965. [Emphasis added.]

In 1977, well after the complainant had been transferred back to the Public Service, his former colleagues in the OVC, who were taken over in 1965 but who were not affected by the second transfer in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the provincial government agreed to compensate the pension loss suffered by about 570 university staff involved in the first take over in 1965. The settlement did not cover the complainant and his colleagues in Diagnostic Services who were the subject of the second transfer, although they too were taken over in 1965.

Like his former colleagues, the complainant claims that, when he was taken over in 1965, he was assured that he would not be worse off. The Ministry of Colleges and Universities, he alleges, by settling the claim in 1977, has apparently accepted that such assurances were given, and accepted responsibility for them.

The complainant's states that his loss is the right to a pension calculated on the average of his best three years of earnings. This he would have been entitled to had it not been for the take over in 1965. The PSSF pension formula changed at the end of the same year, 1965, and a less advantageous pension based on the average of the best five years earnings was offered to all those entering the Public Service after January 1, 1966. The complainant states he suffered a further loss because the university did not pay into the pension plan at the appropriate rate, resulting in the necessity of the complainant contributing an extra sum of money into the PSSF upon his transfer back in 1971.

Thus the complainant claims that his loss, like that of his former colleagues in OVC, was the responsibility of the Ministry of Colleges and Universities, and should be compensated for in like manner. He claims that any differentiation of his status from that of the University employees who were not transferred back to the Public Service is unreasonable and improperly discriminatory in view of the fact that

the complainant performed essentially the same service in the same laboratory throughout his working life, the changes of "employer" in 1965 and in 1971 being paper transactions only.

The Ombudsman also asked the Minister of Colleges and Universities whether she was prepared to give a statement of her Ministry's position on the complaint. By letter dated June 23, 1982, the Director, Personnel Branch, Ministry of Colleges and Universities, responded on behalf of that Ministry. Our investigator, who had been investigating the complaints as against the Ministry of Agriculture and Food and the Public Service Superannuation Board, then proceeded with this aspect of the investigation as well.

In the course of the investigation, the following officials were contacted: the Director, Personnel Branch, Ministry of Colleges and Universities; the Secretary, Public Service Superannuation Board; the Director, University Relations Branch, Ministry of Colleges and Universities; the University Affairs Officer, Ministry of Colleges and Universities; the Benefits Manager, Ministry of Agriculture and Food; and the Technical Coordinator, Policy and Executive Benefits Section, Employee Benefits and Data Services Branch, Ministry of Government Services. Documents supplied by each of the Ministries, by the Public Service Superannuation Board, and by the complainant were reviewed, and meetings were held with various Ministry personnel. As a result of the investigation, the following information was obtained.

The complainant began to work for the Ontario Veterinary College (OVC) of the Ministry of Agriculture and Food, on a temporary basis in 1950 and received a permanent appointment in 1952. He commenced contributing to the Public Service Superannuation Fund (PSSF) on October 1, 1952. He contributed to the PSSF until 1963, when the Ontario Veterinary College was incorporated into the newly formed University and he was transferred from the public service to employment with the University.

Since he was no longer classified as a public servant, the complainant was required to terminate his membership in the PSSF and join the University's pension plan. His pension credits in the PSSF were transferred to the University pension plan.

In June, 1971, the complainant was transferred back to the public service when the Ontario government agreed to take over the diagnostic services from the University. The complainant again transferred his pension credits, this time from the University to the PSSF.

While the complainant was in the employ of the University, on April 10, 1969, he received a memorandum addressed to all faculty and staff members from the Director of Personnel. The text of the memorandum is quoted above.

In May, 1972, the complainant received a statement from the Pension Funds Branch of the Department of Treasury and Economics indicating that in order for him to have a continuous pension from October 1, 1952, he must make up a short-fall in his contribution to the Fund of $605.75. This short-fall resulted from the fact that the University paid only 4% towards his pension during his six years of employment with them rather than the 6% the Ontario government had been paying. The complainant accordingly paid the required amount.

In 1977, colleagues of the complainant in OVC who had been transferred to employment with the University in 1965 but not transferred back to the Ministry of Agriculture and Food in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the Ministry of Colleges and Universities agreed to compensate the pension loss suffered by about 570 university staff involved in the first takeover in 1965. The settlement, however, did not apply to the complainant and his colleagues in Diagnostic Services who were the subject of the second transfer, although they too were taken over in 1965.

The Director, Personnel Branch, Ministry of Colleges and Universities, by letter dated June 23, 1982, responded to the Ombudsman's letter to the Minister, stating that the complainant was an employee of the Ministry of Agriculture and Food, and that his dispute was with the interpretation of the Public Service Superannuation Fund Act. He asked that we direct our inquiries to the Public Service Superannuation Board. Our investigator contacted the Manager of Benefits Delivery, Employee Benefits Branch, Ministry of Government Services, and ascertained that, since the increases in the Canada Pension Plan, the calculation of benefits on the basis of a five-year entitlement for those who do not retire until the age of 65 is now better than a calculation on the basis of three-year entitlement. Our investigator therefore proceeded to investigate that aspect of the complaint which dealt with the short-fall in University contributions, and the settlement made by the Ministry of Colleges and Universities on behalf of other employees affected by the transfer.

On July 2, 1982, an Assistant Director of Investigations with our Office, contacted the Director, Personnel Branch, Ministry of Colleges and Universities, in an attempt to further ascertain his Ministry's position with the differential treatment received by those employees who were and those who were not transferred back to the public service. A meeting was then arranged between our investigator and the University Affairs Officer, Ministry of Colleges and Universities. At that meeting, on August 10, 1982, the Officer acknowledged that a fund of approximately $250,000 per year is paid directly to the University by the Ministry of Colleges and Universities to provide a pension supplement for those employees of the University who suffered pension loss in the 1965 transfer. It was suggested that there might be some way of modifying the agreement between the Ministry of Colleges and Universities and the University so that the complainant would also be eligible for such a pension supplement. On September 8, 1982, our investigator was informed by a Technical Coordinator, Ministry of Government Services, of the nature of the supplemental pension fund established by the Ministry of Colleges and Universities for the benefit of the transferred employees of the University. The fund guaranteed those employees that their pension would be as good or better than that which they would have had had they stayed in the public service throughout.

Our investigator also obtained from the Technical Coordinator a list of all people who had been affected by the transfer to and from the University, and the amounts that they had been required to pay to make up the short-fall in pension contributions by the University.

During telephone conversations of January 21 and February 3, 1983, our investigator and the University Affairs Officer discussed possibilities of including the complainant in the University extra payment plan. In a letter dated January 31, 1983, our investigator proposed a solution to the matter. She suggested that the complainant's situation could be rectified with a lump sum

payment representing the sum he had paid upon transfer back to the PSSF, plus some reasonable rate of interest on this sum.

In a responding letter dated February 7, 1983, the University Affairs Officer outlined the Ministry's position as follows:

> As explained in your letters, these [employees] on their return to OMAF were requested by the Public Service Superannuation Fund to pay individually specified amounts to prevent potential pension loss. For present purposes, they fall into two categories:
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> A. Those who complied with the request, and
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> B. Those who did not
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> Those in category A (eight persons) are out of pocket to the extent of the amounts they paid plus interest to date. The loss to those in category B (three persons) is measured by the pension benefits they have lost by not making the required payment in 1971. You mention a single lump sum settlement as one possible solution for both types. This would be the preferred option from the point of view of the Ministry of Colleges and Universities.

On May 31, 1983, the University Affairs Officer telephoned our investigator and read her a draft letter of the proposed settlement. He stated that employees who had paid amounts which they should not have had to pay to have their pension benefits retained should have these amounts refunded. As for employees who refused to pay the adjustment, they would receive, upon retirement, equivalent pensions to those they would have received had they paid. The difference between the pension they would get now and that which they should have received would be made up yearly by the University from funds provided especially for this purpose by the Ministry.

Subsequent to this conversation, a letter dated June 13, 1983 was forwarded by the University Affairs Officer, which reflected a dramatic change in the Ministry's position. This letter indicated that the Ministry was no longer willing to consider compensation for the complainant. The University Affairs Officer now contended that the arrangement by the Ministry of Colleges and Universities to compensate former public service employees was undertaken to assist those who retired as employees of the University. He further contended that since it was the Ministry of Agriculture and Food which made the initial guarantee to the complainant, and since the complainant retired as an employee of the Ministry of Agriculture and Food, it is that Ministry which should honour its original guarantee.

At this point in the investigation, having reviewed the information obtained from the Ministry of Colleges and Universities, the Ministry of Agriculture and Food, and the Pension Benefits Branch, the Ombudsman formed the view that it was open to him to make a report justifying the following possible conclusions and recommendations:

POSSIBLE CONCLUSION

It appeared that it might be open to the Ombudsman to conclude, pursuant to s. 22(1)(b) of the Ombudsman Act, that the Ministry of Colleges and

Universities was acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

POSSIBLE RECOMMENDATION

It appeared that it might be open to the Ombudsman to recommend, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities reimburse the complainant the $605.75 that he paid to maintain his pension credit in the PSSF, with interest....

In support of the possible conclusion and recommendation, the Ombudsman noted that the Ministry of Colleges and Universities, by entering into the agreement of December, 1977 with the ex-public-servants who at that time were working at the University, assumed responsibility for the discrepancy that had arisen between the employees' understanding of their pension entitlement and the amounts to which they would become entitled under the University's scheme. Furthermore, he noted that the lengthy discussions with our Office on the possible inclusion of the complainant in the 1977 agreement appeared to him to further underscore the Ministry's sense of responsibility for the short-fall in pension payments which arose when the complainant was an employee at the University. He also noted that the ongoing discussions had delayed his ultimate consideration of this complaint, as it had appeared that the matter might be resolved without the necessity of a recommendation.

Pursuant to the provisions of section 19(3) of the Ombudsman Act, the Ombudsman wrote to the Ministry of Colleges and Universities, as a governmental organization which might be adversely affected by his report and recommendations, on September 15, 1983, outlining the results of his investigation to date, and his possible conclusion and recommendation, and gave the Ministry the opportunity to make representations, either in writing, in person, or by counsel. By letter dated October 19, 1983, the Minister of Colleges and Universities responded to the Ombudsman's September 15, 1983 letter.

In her response, the Minister denied that there had been any change in the Ministry's position on the matter investigated, and stated that the Ministry had never acknowledged any responsibility for this complaint. She further stated that the Ministry's only involvement was with those people initially transferred from OMAF to the University who remained in the employment of the University, and that the Ministry could not be held responsible beyond that. In support of her position, she noted the following:

(a) When the initial transfer of staff took place in 1965 to the University, all staff affected were terminated from the employment of OMAF.

(b) When the complainant, among others, returned to OMAF in 1971, [he was] terminated from the employment of the University and [was] employed by OMAF as [a] new employee.

(c) When the [termination] took place referred to in (a) and (b), ... the complainant received applicable compensation as provided for under the respective termination arrangements in the manner that would apply to any other employee. In other words, [a clear separation] took place.

(d) ... the complainant [was] placed as a probationary employee of OMAF on [his] return, and treated in the same manner as other new employees.

(e) ... the complainant [was] offered the option of making up arrears with respect to [his] pension contributions. This is normal procedure where pension transfers are involved.

(f) Memorandum to file in 1979 from [a previous] Director of Personnel at OMAF, indicates that only vacation seniority was granted to the returnees....

(g) Reinstatement of pension credit does not affect the calculation of pension (i.e. best three years vs. best five years).

In summary, the Minister, while expressing some sympathy for the complainant, expressed her opinion that the Ministry of Colleges and Universities was not the appropriate Ministry with which to pursue the matter.

In the course of his review of the Ministry's position, the Ombudsman wrote to the Minister on November 4, 1983 asking clarification of the "applicable compensation" mentioned by the Minister in paragraph (c) of her letter to him. By letter dated November 22, 1983, the Minister provided the Ombudsman with documents which showed details of the transfers in 1965 and 1971. None of these documents indicated that any payment in lieu of pension loss was made to the complainant on his transfer from the University to the Ministry of Agriculture and Food.

On December 7, 1983 the Ombudsman wrote to the Minister once more, asking her to consider one further point. He suggested that her Ministry had accepted responsibility for pension losses suffered by persons who transferred from the public service to the University, the very loss of which the complainant complained, and attached some documents for her consideration. One of these documents was a letter from a previous Minister of Colleges and Universities to the solicitor who acted for members of the University faculty who were attempting to clarify their pension entitlement. This letter outlined the terms on which the Ministry was prepared to provide financial assistance to former civil servants who had transferred to the University in 1965, and formed the basis of the extra payment plan outlined above. By letter dated December 29, 1983, the Minister reiterated her position that the Ministry of Colleges and Universities was responsible only for those who remained employees of the University, and that the Ministry of Agriculture and Food should be responsible for any employees who were transferred back to that Ministry following their employment with the University.

The Ombudsman carefully reviewed the documents provided to him by the Ministry of Colleges and Universities, and considered the Minister's position on this matter. It appeared to him that, although the complainant did not remain in the employ of the University, his contention that he was guaranteed no pension loss on transfer to the University was supported by the fact that the Ministry of Colleges and Universities accepted responsibility for the losses suffered by those employees who did stay with the University. It was his understanding that the

complainant worked at the same job throughout, and that his transfers from Ministry to Ministry were, in essence, paper transactions. His pension loss did not arise as a result of his ultimate transfer back to the Ministry of Agriculture and Food, but rather arose because the University paid a smaller sum into the pension fund than would have been necessary to maintain his pension benefits at the former level.

On the basis of his review, therefore, the Ombudsman concluded, pursuant to s. 22(b)(b) of the Ombudsman Act, that the Ministry of Colleges and Universities was acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

Having thus concluded, the Ombudsman recommended, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities reimburse the complainant the $605.75 that he paid to maintain his pension credit in the PSSF, with interest.

The Ombudsman's final conclusion and recommendation were reported to the Ministry of Colleges and Universities on February 17, 1984.

On March 7, 1984, the Ombudsman received a response from the Minister. It was the Minister's position that the responsibility of the Ministry of Colleges and Universities to the employees of the University had ceased in 1971 and that the Ministry was, therefore, not acting unreasonably in refusing to compensate the complainant.

On March 14, 1984, the Ombudsman wrote to the Assistant Deputy Minister requesting further discussion to resolve this complaint. As no response was received prior to the end of the fiscal year, a report of this complaint was forwarded to the Premier.

DETAILED SUMMARY NO. 7

On July 13, 1978 the Ombudsman received a letter from a lawyer registering a complaint against the Ministry of Housing from the complainants. The complaint concerned the sale of their land in North Pickering to the Province of Ontario.

The lawyer also requested that Mr. Keith Hoilett, who was then conducting hearings into a large number of complaints from people who had sold land in North Pickering to the Province, hear the complaint. Mr. Hoilett decided on September 15, 1978 that he would not do so, because of an agreement between the then Ombudsman and the then Deputy Minister of Housing that only complaints made before December 14 or 15, 1977 would be included in the hearings. Under the agreement, which was never reduced to writing, any subsequently made complaints would be investigated by the Ombudsman's Office in the normal course. Mr. Hoilett said that he wanted to avoid the contingency of the hearings being extended indefinitely by new complaints filtering in. He pointed out that the agreement,

as he understood it, did not "extinguish any rights that these complainants may or may not have". (Transcript, Volume 347, p. 34,736)

On October 23, 1978, the Ombudsman notified the Deputy Minister of his intent to investigate the complaint. The complaint was outlined as follows:

> That the government of Ontario announced on March 2, 1972 that they were going to acquire his property as part of a program to build a new city adjacent to a proposed new airport site.
>
> That in the subsequent taking of his property he was not offered adequate compensation to replace it and that the officials of the project refused to consider his recommendation of comparable properties for use in determining value.
>
> That he was told he could sell his property to the Provincial Government only and that he would not receive any more compensation than he was being offered, and that in fact he may even receive less, if he waited until the government expropriated his property.
>
> That they were not happy with the compensation offered when they finally sold their property to the government, but that at that time they felt their negotiations had come to an end and that they had no other option open to them.

The Deputy Minister replied on November 7, 1978. He said that the complainants' contention related to a transaction finalized in August, 1974. The Province paid $110,250.00 for their house and two acres, and the complainants remained on the property until August, 1974 when they were paid an additional $6,536.00 for entitlements. The complainants purchased a new house in February, 1974 for $94,000.00, and the Province paid their lawyer's fees associated with the purchase. The Deputy Minister said that since the complainants bought their new property in the same time period in which they sold, they were able to take advantage of the rising market apparent across Ontario. He also felt that if the complainants had a valid concern they would have taken it to the Ministry or the Ombudsman earlier. He referred to the widespread publicity generated by the Ombudsman's first report on North Pickering and the subsequent hearings under the Ombudsman Act. He felt that further expenditure of public funds on investigation of and inquiries into the complaint would be inequitable and unjust. He asked that the Ombudsman exercise his discretion under section 18(2) of the Ombudsman Act not to investigate the complaint.

On March 15, 1979, the Ombudsman notified the new Deputy Minister that in his opinion it would be inappropriate to refuse to investigate the complaint. He noted that the complaint had been brought to the attention of the Office of the Ombudsman as early as February of 1977. He said that the delay in coming forward could be considered in forming an opinion about the merits of the complaint, but would be insufficient justification for him to refuse to investigate.

The Ombudsman's letter prompted a further response from the new Deputy Minister dated April 18, 1977. He said that the Province did not negotiate for the purchase of properties on a replacement cost basis but rather on a market value basis, in the spirit of the Expropriations Act. He said that Project officials did, in fact, consider the complainant's recommendation of comparable

properties for use in determining market value. He said that the complainants voluntarily entered into an agreement of purchase and sale with the Province on January 4, 1974, and made no overtures to the Ministry to have their offer withdrawn and cancelled, to await expropriation, despite the Minister's announcement on January 10, 1974 that the area in which the complainants resided would be expropriated.

In September, 1979 the complainants and the new Deputy Minister were notified that the file would be held in abeyance and no investigation conducted until the completion of hearings being conducted by Mr. Hoilett.

After the conclusion of the hearings, Mr. Hoilett wrote a report which was sent to the Ministry (and various other parties) in accordance with section 19(3) of the Ombudsman Act. The Ministry and the other recipients of the report were afforded the opportunity to make representations to the Ombudsman with respect to it. The report also formed the basis for settlement discussions between the Ministry and the Ombudsman. During these discussions, the then Counsel and Special Adviser to the Ombudsman raised with the Ministry the treatment of complaints held in abeyance, including this complaint.

Copies of notices of intent to investigate all the complaints then held in abeyance were provided to the then Director of Land Operations for the Ministry. He undertook to advise our Counsel and Special Adviser whether the Ministry was willing to settle with these complainants on the same basis as it proposed to settle with the Hoilett complainants. Unfortunately, he did not give any advice to our Counsel and Special Adviser regarding the complainants or the other complainants in the same category prior to his transfer to another branch of the Ministry. On December 20, 1982 the Ombudsman issued the Report of the Ombudsman of Ontario as a result of Certain Complaints in Relation to the North Pickering Project. In it he disclosed that he had reached agreement with the Minister on a revised settlement proposal under which the majority of complainants would receive additional compensation for their land. The report did not discuss complaints held in abeyance.

The matter was then raised with the successor as Director of Land Operations, who requested a written statement of the Ombudsman's position on the complaint. In a letter dated March 3, 1983 to the Minister of Municipal Affairs and Housing, the Ombudsman, after setting out the facts, wrote:

> It appears to me that the complainants should be compensated for their property according to the same principles as the other North Pickering complainants. It is therefore my recommendation that the formulae contained in the revised settlement proposal be applied to them.

On August 2, 1983, the successor as Director of Land Operations replied to the Ombudsman's letter. He referred to the Deputy Minister's previously stated position and said that he was unable to identify any further evidence which would lead the Ministry to differ from this conclusion. He added:

> In light of the Deputy Minister's letters of April 18, 1979 it would be helpful if you identify those comments with which you disagree, and why, and how your office considers these two complaints should be dealt with.

By letter dated November 22, 1983, the Ombudsman wrote to the Minister, pursuant to section 19(3) of the Ombudsman Act, stating his tentative views on the complaint. The letter stated:

> In my opinion, it might be open to me to make a report that would justify the possible conclusion and recommendation referred to below. The possible conclusion and recommendation are as follows:
>
> Possible Conclusion
>
> In my opinion it may be open to me to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing has unreasonably omitted to pay [the complainants] fair compensation for their land.
>
> Possible Recommendation
>
> In my opinion it may be open to me to recommend, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that [the complainants] be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that they be paid additional money for their land in accordance with its terms.

The Ombudsman said that, in his opinion, the last two paragraphs of the complainants' contentions set out the "typical" North Pickering complaint. He referred to the Ombudsman's Report, Pages 227-228, in which Mr. Hoilett is quoted as follows:

> The early decision of Project Officials to establish market values as of March 1 or 2, 1972 had the obvious merit of uniformity and having regard to the early expectations as to the timing of expropriation and the immediately antecedent market conditions, may even have been a reasonable decision. It had the effect, however, of effectively freezing market values or creating the impression of frozen market values - a perception that was fostered by the acts and omissions of the Project and its officials.... [Emphasis added.]
>
> The Project's early adherence to March 1972 values and the fostering of the impression that it would not alter its position, given the rise in the real estate market outside the Project area, that was becoming increasingly apparent, created undue pressure on North Pickering landowners, many of whom would have to seek replacement properties in a rising market using 1972 dollars. The fact that agents were at the time representing to landowners that they stood to lose by waiting for expropriation simply exacerbated a situation that was becoming increasingly intolerable.

He continued:

> The other part of the complaint is that they were not offered adequate compensation to replace their house. Mr. Hoilett's conclusions on replacement problems were quoted at pages 222 to 224 of the Ombudsman's Report. In general, he concluded:

> ... the evidence strongly supports the general conclusion that, even granting some reasonable definition of replacement, many landowners encountered difficulties in replacing their properties for the amount of compensation received from the Project.

Mr. Hoilett outlined several reasons for the replacement problems, and noted that the extent of the problem varied from case to case. He concluded that in cases of greatest hardship the Ministry ought to have invoked section 15 of the Expropriations Act and given some effect to the "home for home" concept, and that the Project's failure to do so was an unreasonable omission. The Ministry, in its representations to the Ombudsman, disagreed with Mr. Hoilett's conclusion. However, in the final settlement agreement, for residential properties on less than 10 acres the Ministry proposed to pay an additional 10% of the updated market value in recognition of the replacement difficulties.

Essentially, it was the Ombudsman's view that the complaint was typical of the North Pickering complaints which were resolved by the revised settlement proposal. The findings of fact made by Mr. Hoilett appear to apply to the complainants' situation as much as to the complainants included in the proposal. It was therefore the Ombudsman's tentative view that the complaint should be included in it.

The Minister made written representations to the Ombudsman by letter dated January 12, 1984. He wrote:

> My Ministry was first apprised of [the complainant's] complaint in mid-1978 by ..., a counsel for complainants at the Hoilett hearings. [The complainant] had been interviewed over the telephone by [an Ombudsman employee] on February 17, 1977. [The Ombudsman's employee] had contacted [the complainant] in a search for witnesses to give similar fact evidence on behalf of [the complainants] at the Donnelly Commission. [The Ombudsman's employee's] interview record with [the complainant] which was produced to Ministry counsel by [the complainant's lawyer], does not disclose that [the complainant] made a complaint to the Ombudsman at the time of his interview with [the Ombudsman's employee]. The Ministry was formally notified of [the complainant's] complaint to the Ombudsman by a letter dated October 23, 1978.
>
> I concur with the statement of [one of our former Deputy Ministers] who advised Mr. Hoilett, then Temporary Ombudsman, in November of 1978, that if ... [the complainant] had valid concerns that [he] would have brought them to the attention of the Ombudsman earlier than [he] did.

The Minister added that the Ministry had rejected Mr. Hoilett's report and had specifically rejected Mr. Hoilett's conclusion that the government created the impression that land values were frozen and that the the Government unreasonably omitted to apply section 15 of the Expropriations Act.

The Minister said that the settlement proposal had been put forward by the Ministry to resolve "qualifying" Hoilett and Donnelly complaints. He said, "It was never intended to be an admission of liability with respect to the

Government's land acquisition programme in North Pickering nor was it intended to apply automatically to any subsequent North Pickering complaints."

Accordingly, the Minister stated that he could not agree with my possible conclusion and recommendation.

The Ombudsman carefully considered the Minister's representations.

It is true that the complainants' formal complaint was made well after the Hoilett and Donnelly complainants had come forward. On the other hand, the complainants' dissatisfaction was made known to the Office of the Ombudsman in February of 1977. As the Ombudsman understood it, the Minister's point was that the complainants' delay in making their formal complaint tended to disprove the merit of it. The Ombudsman was satisfied that on its merits, the complaint ought to have been treated the same way as the complaints resolved under the revised settlement proposal. The Ministry could not argue that it was taken by surprise by the complaint or that it budgeted and planned on the basis of known complaints, excluding this complaint. The agreement reached by the first Ombudsman and the then Deputy Minister establishing December 14 or 15, 1977 as the termination date for complaints to be heard by Mr. Hoilett expressly contemplated that the Ombudsman would investigate and report on subsequent complaints. If such complaints had been forgotten, the then Director of Land Operations for the Ministry was reminded of them during the settlement discussions between the Ombudsman and the Ministry.

While it was true that the settlement proposal dealt with the Hoilett and Donnelly complaints only, to the Ombudsman's knowledge the Ministry did not take the position during the settlement discussions that it would refuse to extend the settlement to include this complaint and other complaints held in abeyance. Indeed, according to a memorandum to file prepared by our Counsel and Special Adviser:

> Following the Ombudsman's first meeting with the then Deputy Minister and [outside legal counsel] at the request of [the Director of Land Operations], [the Ombudsman] sent copies to [the Director of Land Operations] of all 19(1) letters and replies. Apparently the Ministry couldn't locate their documentation.
>
> Since the Ministry's revised settlement proposal did not address those few complaints being held in abeyance where the proposal might be applicable, I asked [the Director of Land Operations] about one month ago to give me some indication as to whether the Ministry was prepared to settle with these one or two complainants on the same basis as was set out in the Ministry's revised settlement proposal. [The Director of Land Operations] indicated that he would have to check and get back to me.
>
> Since I did not hear from [him], I contacted him on December 20 and again put the same question to him. At that time [he] agreed to prepare a memorandum for me addressing all the complaints, the 19(1) letters and the replies of which I had sent him, indicating whether or not they will be covered by the proposal or not, and if not, why not. For example, it was his understanding that some of these complainants had already settled independently with the Ministry.

Finally, it is not the Ombudsman's intention to apply the settlement automatically to all subsequent North Pickering complaints. Indeed, since the issuance of the Ombudsman's Report this office has declined to investigate a small number of "new" North Pickering complaints precisely because of the complainants' delay in coming forward.

It was therefore the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing had unreasonably omitted to pay the complainants fair compensation for their land.

The Ombudsman recommended, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that the complainants be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that they be paid additional money for their land in accordance with its terms.

The Ombudsman's final conclusion and recommendation were reported to the Ministry on February 13, 1984.

On March 30, 1984, the Ombudsman reported this complaint to the Premier as no response had been received from the Ministry, and, in the Ombudsman's opinion, a reasonable time had passed and the Ministry had not taken action which the Ombudsman considered appropriate or adequate.

DETAILED SUMMARY NO. 8

The complainant first contacted the Ombudsman by letter dated March 1, 1978. In his letter the complainant complained that he had been unfairly treated by the Government of Ontario in the purchase of his land in North Pickering. On October 6, 1978, the Ombudsman notified the then Deputy Minister of Housing of his intent to investigate the complaint. The complaint was outlined as follows:

> That the government of Ontario announced on March 2, 1972 that they were going to acquire his land as part of a programme to build a new city adjacent to a proposed new airport site.
>
> That written publications from the government, reports in the media and conversations with officials of the government clearly indicated that the price he would be paid for his land, either by voluntary negotiated sale to the province or by the only alternative of expropriation, was the market value as it existed on March 2, 1972 and that this price was fixed.
>
> That he sold his property to the province in 1973 at a figure which represented a March 2, 1972 valuation. Whereas if he had known that the price to be paid was not fixed, and that if he had waited to be expropriated he would have received a value based on the date of expropriation rather than the date of the announcement, he would not have sold when he did.
>
> That he acted to his detriment by believing representations made by the province and its agents and that he should now be treated fairly and in the same way as those people who were expropriated.

The Deputy Minister was also invited to state his Ministry's position on the complaint.

He replied by letter dated November 10, 1978. He stated that the complainant, a lawyer with a well-known law firm, was active in the "People or Planes" movement and was the author of a text on expropriation law. Thus the complainant was well informed about the issues. The Deputy Minister also felt that if the complainant had a valid concern he would have brought it to the Ministry or the Ombudsman earlier. He referred to the widespread publicity generated by the Ombudsman's first report on North Pickering and the subsequent hearings under the Ombudsman Act. He felt that further expenditure of public funds on investigation of and inquiries into the complaint would be inequitable and unjust. He asked that the Ombudsman exercise his discretion under section 18(2) of the Ombudsman Act not to investigate his complaint.

On March 15, 1979, the then Ombudsman notified the new Deputy Minister that in his opinion it would be inappropriate to refuse to investigate the complaint. The Ombudsman noted that the delay in processing the complaint after March 1978 appeared to be the responsibility of this Office and that it would be unjust for the complainant to suffer for this reason. He said that the delay in coming forward could be considered in forming an opinion about the merits of the complaint, but would be insufficient justification for him to refuse to investigate.

This letter prompted a further reply from the new Deputy Minister on April 18, 1979. He stated that there had been no publications by the government indicating that the price to be paid an owner would be market value as of March 2, 1972. The government could not be held responsible if there had been media reports to this effect. He referred to a letter dated February 19, 1973 to the government from the complainant, in which the complainant wrote:

> I also confirm the discussion with you concerning possible income tax liability. As you know there is a Capital Gains Tax from January 1, 1972 and I will require your estimate of the value of the land at least on March 2, 1972 and your estimate of the increase in value to date of sale. From our discussion I have concluded that you have built in a factor of approximately 1% per month which for present purposes shows a total increase from March 2, 1972 to date of 12%.

The new Deputy Minister also referred to a letter to the complainant from the government dated March 1, 1973 stating market value as at March 2, 1972 to be $236,438, followed by an Agreement of Purchase and Sale dated March, 1973 stating a price of $263,600.

The new Deputy Minister stated that the representations by the government acknowledged increasing real estate values, and that the complainant decided to sell his property with full knowledge of them. In his view, the complainant was treated fairly during negotiations in 1973 and there was no justification to re-open the purchase price. Finally, he pointed out that the complainant received $268,000 on May 31, 1973 and had rent-free use and occupation of the property from that date until June 30, 1975.

Meanwhile, Mr. Keith Hoilett was continuing with hearings under the Ombudsman Act with respect to approximately 90 North Pickering complainants. An additional group of complainants appeared before the Donnelly Commission.

In September, 1979 the complainant and the new Deputy Minister were notified that the file would be held in abeyance and no investigation conducted until the completion of the Hoilett hearings.

After the conclusion of the Hoilett hearings, Mr. Hoilett wrote a report which was sent to the Ministry (and various other parties) in accordance with section 19(3) of the Ombudsman Act. The Ministry and the other recipients of the report were afforded the opportunity to make representations to the Ombudsman with respect to the Hoilett report. The report also formed the basis for settlement discussions between the Ministry and the Ombudsman. During these discussions, the then Counsel and Special Adviser to the Ombudsman raised with the Ministry the treatment of complaints held in abeyance, including this complaint.

Copies of notices of intent to investigate all the complaints then held in abeyance were provided to the then Director of Land Operations for the Ministry. He undertook to advise our Counsel and Special Adviser whether the Ministry was willing to settle with these complainants on the same basis as it proposed to settle with the Hoilett complainants. Unfortunately, he did not give any advice to our Counsel and Special Adviser regarding the complainant or the other complainants in the same category prior to his transfer to another branch of the Ministry. On December 20, 1982 the Ombudsman issued the Report of the Ombudsman of Ontario as a result of Certain Complaints in Relation to the North Pickering Project. In it he disclosed that he had reached agreement with the Minister on a revised settlement proposal under which the majority of complainants would receive additional compensation for their land. The report did not discuss complaints held in abeyance.

The matter was then raised with the succeeding Director of Land Operations, who requested a written statement of the Ombudsman's position on the complaint. In a letter dated March 3, 1983 to the Minister of Municipal Affairs and Housing, the Ombudsman, after setting out the facts, wrote:

> The complainant's situation seems to be the same, in principle, as the other North Pickering complainants whom the Ministry has agreed to compensate. It is therefore my recommendation that the formulae in the revised settlement proposal be applied to the complainant.

On August 2, 1983 the Director of Land Operations' successor replied to the Ombudsman's letter. He referred to the Deputy Minister's previously stated position and said that he was unable to identify any further evidence which would lead the Ministry to differ from this conclusion. As a point of interest he added that the complainant had had subsequent dealings with the Ministry on very favourable terms. He closed by stating:

> In light of the Deputy Minister's letters of April 18, 1979 it would be helpful if you identify those comments with which you disagree, and why, and how your office considers these two complaints should be dealt with.

By letter dated November 22, 1983, the Ombudsman wrote to the Minister, pursuant to section 19(3) of the Ombudsman Act, stating his tentative views on the complaint. The letter stated:

In my opinion, it might be open to me to make a report that would justify the possible conclusion and recommendation referred to below. The possible conclusion and recommendation are as follows:

Possible Conclusion

In my opinion it may be open to me to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing has unreasonably omitted to pay [the complainant] fair compensation for [his] land.

Possible Recommendation

In my opinion it may be open to me to recommend, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that [the complainant] be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that [he] be paid additional money for [his] land in accordance with its terms.

My reasons are as follows.

. . . .

In my opinion the complaint is typical of the majority of North Pickering complaints heard by Keith Hoilett. I have reviewed his contentions in the light of Mr. Hoilett's conclusions and the Ombudsman's Report, and can see nothing significant which would distinguish this complaint from those ultimately resolved by the settlement between the Ministry and the Ombudsman.

Essentially, the complainant argued that because of government publications, conversations with government officials and media reports, he was led to believe that the price that he would be paid for his land, whether he sold it voluntarily or waited for expropriation, was its value as at March 2, 1972. At pages 227 to 228 of the Ombudsman's Report, Mr. Hoilett is quoted on this contention as follows:

> The early decision of Project officials to establish market values as of March 1 or 2, 1972 had the obvious merit of uniformity and having regard to the early expectations as to the timing of expropriation and the immediately antecedent market conditions, may even have been a reasonable decision. It had the effect, however, of effectively freezing market values or creating the impression of frozen market values - a perception that was fostered by the acts and omissions of the Project and its officials....
>
> The Project's early adherence to March 1972 values and the fostering of the impression that it would not alter its position, given the rise in the real estate market outside the Project area, that was becoming increasingly apparent, created undue pressure on North Pickering landowners, many of whom would have to seek replacement properties in a rising market using 1972 dollars. The fact that agents were at the time

> representing to landowners that they stood to lose by waiting for expropriation simply exacerbated a situation that was becoming increasingly intolerable.

The complainant also contended that when he sold his property in 1973, he was paid a price which represented a March 2, 1972 valuation. He claimed that if he had known the price was not fixed and that if he waited to be expropriated he would receive a value as of the date of expropriation, he would not have sold when he did. The Ministry has responded to this contention in part by arguing that the complainant acknowledged in a letter to the Ministry dated February 19, 1973 that he knew the government was paying an increase in market value of 1% a month.

Mr. Hoilett found the Ministry's update policy to be inadequate. At page 227 of the Ombudsman's Report he is quoted as follows:

> ... The subsequent introduction of an update policy of 1% per month to existing appraisals was a further concrete attempt by the Project to apply s. 14 of the Expropriations Act to the North Pickering context. That policy, in its genesis, was questionable in principle and in its application. The Project's policy of steadfastly adhering to that policy, with the passage of time, became increasingly more suspect. The policy was manifestly ad hoc and arbitrary.
>
> ... While the Project may not have been able, with slide-rule precision, to quantify the increases that were taking place in the real estate market, based on its market surveys, among other things, it was armed with a fund of market information that placed it in a position much superior to the individual landowners with whom it was dealing. (page 228)

The Ombudsman noted at page 298 of his Report:

Secondly, and as previously mentioned, in its original proposal, the Ministry of Municipal Affairs and Housing conceded that Project staff were unable to update sufficiently Project appraisals for many of the properties, due to the unprecedented volatility of the real estate market. This helpful admission on the Ministry's part has rendered redundant any finding by me in this respect.

Finally, the complainant argued that he should be paid fair market value as of the date of expropriation. As you know, this argument was explicitly rejected by the Ombudsman. Instead, the revised settlement agreement provided for updating prices to the date of agreement of purchase and sale.

Your Ministry has observed that the complainant is a lawyer well versed in the law of expropriation, and that he was active in the People or Planes group. The former Ombudsman did not accept that the putative expertise of any landowner justified exclusion from the revised settlement agreement. Ultimately, as you well know, a group of 18 investors were kept out of the agreement, and all others were included.

Regardless of the complainant's professional qualifications or expertise, his property was residential and I do not think the argument could be made that he should be excluded on the same basis as the 18.

Your Ministry has also referred to its subsequent dealings with the complainant, which in the Ministry's view were favourable to him. This was put to the complainant, who strenuously denied it, and also pointed out that the release he gave to the Ministry in connection with these dealings expressly excluded his complaint to the Ombudsman.

The Minister made written representations by letter dated January 12, 1984. He wrote:

I cannot agree with your opinion that the complaint is typical of the majority of North Pickering complaints heard by Mr. Hoilett. It has been noted in previous Ministry correspondence that the complainant is an experienced expropriation counsel and author of the Ontario Expropriation Handbook (Toronto, 1978). A resident of North Pickering, he was no doubt, aware of the opportunity to complain to the Ombudsman regarding the purchase of his property by the Government. However, the complainant did not submit a complaint to the Ombudsman until March of 1978.

In October 1978, the complainant served notice on the Minister with respect to the repurchase of the structure.

The Ministry denied the repurchase on the basis that any right to repurchase was at the sole discretion of the Minister and further, that any such right expired on January 31, 1975, pursuant to the original Agreement of purchase and sale. In April 1979, the complainant issued a Notice of Claim through the courts in respect to the buy-back provision. To avoid court proceedings, the Ministry sold the complainant an unserviced building lot in the Hamlet of Whitevale, for its market value of $45,000. and also the house on his former property for $1.00, which he was to move on to the Whitevale lot at his own expense. The repurchase price of the dwelling as agreed upon between both parties was originally $72,800.

I acknowledge that this transaction did not in anyway interfere with the complainant's rights to pursue his complaint to the Ombudsman. Nevertheless, I think you will agree that he was the beneficiary of a very favourable transaction.

The Minister added that the Ministry had rejected Mr. Hoilett's report, and had specifically rejected Mr. Hoilett's conclusions that the initial project appraisals were effective March 1 or 2, 1972, that the government created the impression that land values were frozen and that the government unreasonably omitted to apply section 15 of the Expropriations Act. The Minister said that the settlement proposal had been put forward by the Ministry to resolve "qualifying" Hoilett and Donnelly complaints only. He said, "It was never intended to be an admission of liability with respect to the Government's land acquisition programme in North Pickering nor was it intended to apply automatically to any subsequent North Pickering complaints."

Accordingly, the Minister stated that he could not agree with the possible conclusion and recommendation.

The Ombudsman carefully considered the Minister's representations. Although the complainant's professional qualifications perhaps did not make him a typical North Pickering complainant, if indeed there can be said to be a typical complainant, the Ombudsman thought that the substance of his complaint was typical of the majority of North Pickering complaints. In the Ombudsman's opinion, the focus should have been on the facts of the complaint, and not on the character and qualifications of the complainant.

With respect to the repurchase transaction between the Ministry and the complainant, the Ombudsman would again point to the fact that the Ministry accepted a release from the complainant which expressly excluded his complaint to the Ombudsman. As to whether the complainant was the beneficiary of a very favourable transaction, the complainant pointed out that he bore the entire cost of moving the house from the old location to the new location and re-establishing it on new foundations, costs which he claimed totalled $185,000.

As for the complainant's delay in coming forward with his complaint, it was true that he complained well after the Hoilett and Donnelly complainants had come forward. As the Ombudsman understood it, the Ministry's point was that the complainant's delay in making his complaint tended to disprove the merit of the complaint. The Ombudsman was satisfied that, on its merits, the complaint ought to have been treated the same way as the complaints resolved under the revised settlement agreement. The Ministry could not argue that it was taken by surprise by the complaint or that it budgeted and planned on the basis of known complaints, excluding the complaint. Indeed, the first Ombudsman and the then Deputy Minister had agreed that North Pickering complaints made after December 14 or 15, 1977 would not be heard by Mr. Hoilett, but would be investigated and reported by the Ombudsman's Office in the normal course (transcript of Hoilett hearings, Volume 347). If such complaints had been forgotten, then the Director of Land Operations was reminded of them during the settlement discussions between the Ombudsman and the Ministry.

While it is true that the settlement proposal dealt with the Hoilett and Donnelly complaints only, to the Ombudsman's knowledge the Ministry did not take the position during the settlement discussions that it would refuse to extend the settlement to include the complaint and other complaints held in abeyance. Indeed, according to a memorandum to file prepared by our Counsel and Special Adviser:

> Following [the Ombudsman's] first meeting with the then Deputy Minister, and [outside legal counsel] at the request of [the Director of Land Operations], I sent copies to [him] of all 19(1) letters and replies. Apparently the Ministry couldn't locate their documentation.
>
> Since the Ministry's revised settlement proposal did not address those few complaints being held in abeyance where the proposal might be applicable, I asked [the Director of Land Operations] about one month ago to give me some indication as to whether the Ministry was prepared to settle with these one or two complainants on the same basis as was set out in the Ministry's revised settlement proposal. [He] indicated that he would have to check and get back to me.

> Since I did not hear from [him], I contacted him on December 20 and again put the same question to him. At that time [he] agreed to prepare a memorandum for me addressing all the complaints, the 19(1) letters and the replies of which I had sent him, indicating whether or not they will be covered by the proposal or not, and if not, why not. For example, it was his understanding that some of these complainants had already settled independently with the Ministry.

Finally, it was not the Ombudsman's intention to apply the settlement automatically to all subsequent North Pickering complaints. Indeed, since the issuance of the Ombudsman's Report this office has declined to investigate a small number of "new" North Pickering complaints precisely because of the complainants' delay in coming forward.

It was therefore the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing had unreasonably omitted to pay the complainant fair compensation for his land.

The Ombudsman recommended, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that the complainant be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that he be paid additional money for his land in accordance with its terms.

The Ombudsman's final conclusion and recommendation were reported to the Ministry on February 13, 1984.

On March 30, 1984, the Ombudsman reported this complaint to the Premier, as no response had been received from the Ministry, and in the Ombudsman's opinion a reasonable time had passed and the Ministry had not taken action which the Ombudsman considered appropriate or adequate.

DETAILED SUMMARY NO. 9

This complaint was brought to the Office of the Ombudsman on February 11, 1982. The complainant contended that by virtue of an agreement between the Federal Department of Indian and Northern Affairs and the Solicitor General of Ontario, he, as a Special Constable in the Indian Policing Service, is entitled to employment benefits similar to those given to Provincial Police officers.

The investigation revealed that an agreement setting up the Indian Special Constable program was signed by the Federal Minister of Indian Affairs and Northern Development and by the Ontario Solicitor General on July 18, 1975. The agreement was renewed on April 11, 1981 and is to expire on March 31, 1984. Paragraph 11 of the original agreement stated that salaries and benefits were to be equivalent to those received by members of the Ontario Provincial Police. However, pension benefits have yet to be implemented.

On May 25, 1982, the Ombudsman wrote to the then Deputy Solicitor General and to the Commissioner of the Ontario Provincial Police, to notify them of the nature of the complaint and of his intention to conduct an investigation. In his response, the Commissioner stated that at the time of the 1978 federal/provincial agreement which included proposed pension arrangements, a Royal

Commission was studying pensions in Ontario. As a result, Special Constables' pensions were temporarily deferred. He further stated that subsequent to the publication of the report, steps had been taken that would soon implement the pension plan.

Further contact with the Ministry during the course of the investigation revealed that further delay in the implementation of the pension plan resulted from the formation of another study group in 1981, to consider the implications of pension plans of the civil service. Also under consideration was the question of whether a Special Reserve Constable is a provincial government employee.

Based on the results of the investigation, the Ombudsman, on July 25, 1983, tentatively concluded that the Ministry's delay in the implementation of the pension benefit scheme was unreasonable, and he tentatively recommended that the Ministry should provide these benefits. As the tentative conclusion and recommendation might have adversely affected the Ministry, the Ombudsman afforded the Deputy Minister the opportunity to make representations.

The Deputy Minister responded in a letter dated August 15, 1983. He provided three reasons as to why the pension benefits had as yet not been provided. The reasons outlined were: first, while the federal/provincial agreement contemplates pensions, it does not create an entitlement; second, while the Ministry intends to provide pensions, it is not at present feasible to do so due to a lack of funds; and, third, the decision of the Ontario Divisional Court in Re Fleming and the Commissioner of the Ontario Provincial Police impedes implementation of the plan.

The Ombudsman then notified the Deputy Minister of the Federal Department of Indian and Northern Affairs of his tentative conclusion and recommendation, as the Department might also have been adversely affected. A response was received on February 8, 1984.

After carefully reviewing the contents of both responses, the Ombudsman issued a report confirming his opinion that the delay in the implementation of the pension benefit scheme was unreasonable, and that the benefits should be provided, although not necessarily in a plan that is retroactive in nature.

No formal response to the Ombudsman's recommendation was subsequently received from the Ministry of the Solicitor General and on March 15, 1984, the Ombudsman exercised his discretion and referred the matter to the Premier for consideration.

DETAILED SUMMARY NO. 10

This complaint involved the determination of whether the complainant was a "creditor" within the meaning of the Public Works Creditors Payment Act. The complainant is the owner of a company which rented construction equipment to a contractor for use in the building of a sewer system, under contract with the Ministry of the Environment.

The Ministry stopped the construction project, and the complainant made a claim under the Public Works Creditors Payment Act for payment of the monies

owing to his company by the contractor. The Minister rejected this claim on the ground that the complainant was merely a renter of equipment, and therefore not eligible to be a creditor.

After extensive investigation, the Ombudsman concluded that the Minister's decision not to accept the complainant's claim under the Public Works Creditors Payment Act was a mistake of law, and recommended that the Minister's decision be cancelled and that he accept and consider the claim as one properly made under the provisions of that Act.

The Ombudsman received written confirmation from the Ministry that it had decided to implement his recommendation and would accept and consider the claim made by the complainant as a claim properly made under the provisions of the Public Works Creditors Payment Act. The complainant was advised that the complaint had been successfully resolved, and his file was closed.

The Ministry appointed an adjudicator to assess the amount of the claim. The adjudicator awarded the complainant $27,730.30 on his claim for rental charges, but did not award the claim for interest charges on the amount he had originally claimed or the claim for legal costs in pursuing his claim.

On February 29, 1980, the complainant wrote to the Ombudsman's Office and complained against the Ministry of the Environment for failing to pay interest charges and legal costs as claimed.

The investigation focused on two issues: first, whether the Minister has authority under the Public Works Creditors Payment Act to pay the interest as part of, or in addition to, a payment of a claim within the meaning of section 2 of the Act, and secondly, whether the Minister has the authority under that Act to pay the claim for legal costs. Legal research indicated that the adjudicator was wrong in law to decide that the claim for interest could not form part of a claim pursuant to the Public Works Creditors Payment Act. Moreover, the Ombudsman felt that there was no jurisdictional impediment to the Minister, under the legislation, preventing him from paying interest, providing that he found that the claim for interest was part of the contractor's obligation to the creditor. The investigation showed that there was an express contractual obligation by the contractor to pay interest to the complainant.

On March 20, 1981, the Ombudsman notified the Minister and the adjudicator of his tentative conclusions and tentative recommendations, pursuant to section 19(3) of the Ombudsman Act. It was the Ombudsman's possible conclusion that the Minister's conclusion that he does not have the authority to pay interest under the Public Works Creditors Payment Act was based on a mistake of law, and as a result, the Minister had failed to properly exercise his discretion under section 2(2) of the Act.

The Ombudsman further advised the Minister of his tentative recommendation that the Minister accept and consider the claim for interest as one properly made under the provisions of the Act.

The Minister was also advised that the complainant had twice incurred legal costs, once with respect to the initial hearing, and again with respect to the hearing before the adjudicator. The Ombudsman indicated that the second set

of costs need not have been incurred but for the erroneous interpretations of the Act accepted and acted upon by the Minister. The Ombudsman then further advised the Minister that it was open to him to recommend that the complainant receive from the Ministry his legal costs for the second hearing as equitable compensation to the complainant for costs incurred directly as a result of the erroneous interpretations of the Act.

The Minister responded to the tentative conclusion, stating that the previous Minister had not made an error in the initial exercise of his discretion to reject the entire claim, but that, as a result of the interpretation given to the legislation by the Ministry, the complainant might have suffered great hardship, and therefore the Ministry had reopened its consideration on humanitarian grounds.

The Minister gave two reasons for not paying interest, as follows: first, that the Minister had an absolute discretion under the Public Works Creditors Payment Act and he had decided to exercise that discretion against the complainant; and secondly, that the complainant's solicitor waived the interest claimed at the hearing before the adjudicator.

An authority exercising a statutory discretion must have regard to all the relevant circumstances, and must act within the intent and spirit of the legislation empowering him to decide the question before him. The discretion that is exercised cannot be total to the extent that the Minister can disregard relevant circumstances or the spirit of the legislation. The Minister must not misconstrue the scope of his discretion, which it seemed the Minister might have done in this case, by believing that the claim made by the complainant was initially not a valid one and that the Minister had no authority to pay a claim for interest.

The second reason given by the Minister for not paying interest was the assertion that legal counsel for the complainant, after consulting with the complainant, waived the claim for costs and interest either prior to or during the hearing before the adjudicator. The complainant and his counsel denied this assertion and there was no evidence in support of the Minister's position.

After reviewing carefully the arguments made by the Minister, the Ombudsman issued a report confirming his opinion that the Minister's decision that he did not have the authority to pay interest under the Public Works Creditors Payment Act to the complainant was based on a mistake of law. In addition, the Ombudsman found that the Minister unreasonably exercised his discretion in not considering the complainant's claim for interest under the Public Works Creditors Payment Act.

It was the Ombudsman's recommendation that the decision of the Minister, to accept the recommendation of the adjudicator not to pay the claim for interest made by the complainant, be cancelled, and that the Minister accept and consider the claim for interest as one properly made under the provisions of the Public Works Creditors Payment Act.

Notwithstanding that he tentatively recommended that the Minister pay the legal costs on equitable grounds, the Ombudsman believed that in the context of this complaint a recommendation to pay legal costs should be based on the Public Works Creditors Payment Act. The legal research indicated that this was

not possible, and the Ombudsman was not prepared to make a recommendation to the Minister that the legal costs be paid.

The Ombudsman received a response from the Minister stating that he disagreed with these conclusions. The Ombudsman then advised the Minister that his response was not adequate or appropriate, but that he would not be sending a copy of his report to the Premier.

In addition, the Ombudsman wrote to the complainant to advise him of the Minister's response which, in his opinion, was not adequate or appropriate. The Ombudsman also advised the complainant that he would not be sending a copy of his report to the Premier.

On February 21, 1984, the complainant requested that the new Ombudsman review the report issued by his predecessor regarding his complaint, with the intention of referring the report to the Premier and then to the Select Committee on the Ombudsman for the Committee's consideration.

Having reviewed the report, the new Ombudsman exercised his discretion and on March 22, 1984, referred the matter to the Premier for consideration.

DETAILED SUMMARY NO. 11

On September 19, 1979, the complainant registered a complaint against the Workers' Compensation Board Appeal Board with this Office. She contended that her left shoulder disability arose out of and in the course of her employment, and that she was entitled to compensation benefits. After receiving notification of our intention to investigate this complaint, the Board stated that it did not wish to make a statement at that time. The file was then assigned for investigation.

The investigation revealed that for two-and-a-half years the complainant worked eight hours a day as an "underpad catcher", continuously catching pads with her left hand, packing the pads into boxes, pushing the 35-lb. boxes across the floor, and piling them onto skids. The complainant handled approximately 14,000 pads and 35 boxes per day. When pain developed in her left arm and shoulder, she was transferred to a job which required her to lift seven to eight 10-lb. rollers of material and four to five 35-lb. rollers from a pile above her head. The complainant continued at this job for nine months, and laid off with left shoulder and arm pain.

Several specialists and x-rays identified rotator cuff tendinitis. A specialist in physical medicine and rehabilitation diagnosed tendinitis and related the condition to the repetitive nature of the complainant's work. The specialist reiterated this opinion two months later. Before it reached its final determination of this case, the Appeal Board referred the complainant to a neuropsychiatrist for an assessment. The neuropsychiatrist considered tendinitis a possible diagnosis, but attributed the pain instead to a neurosis that had resulted from a conflict within the complainant concerning her type of work. The Appeal Board accepted the neuropsychiatrist's diagnosis and denied entitlement.

In the course of his investigation, the Ombudsman formed the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to find that this disability did not arise out of and in the course of employment, given the medical evidence. The Ombudsman pointed to the Board policy on disablement, which indicated that entitlement will be allowed where the Board has established a relationship between "any work-related movement" and the disability. The Ombudsman then stated that the bulk of the medical evidence diagnosed tendinitis and established a relationship between the tendinitis and the complainant's type of work. He stated further that the only medical evidence that commented on the relationship between disability and the work supported this case. The Ombudsman, therefore, recommended tentatively, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant entitlement.

In its response, the Appeal Board admitted that the specialist in internal medicine and rehabilitation did establish a relationship between the disability and the work. The Board indicated, however, that it preferred the opinion of the neuropsychiatrist, who did not find such a relationship. The panel did not feel that there was sufficient medical evidence to establish "something about the work" as the cause of the disability.

The Ombudsman reviewed the medical documentation in light of the Board's response. He indicated that the neuropsychiatrist did not support a relationship, but did concede that the diagnosis of tendinitis was a possibility. The Ombudsman also stated that a diagnosis of neurosis bore no relevance to the nature of the disability suffered three years previously. He also underlined the Board policy which indicated that disability could stem from merely "a movement arising out of the work which is reasonable to consider has caused the disablement." He felt that the medical evidence had established entitlement under this category.

The Ombudsman then concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable in denying entitlement on the grounds that an "accident" under section 1(1)(a)(3) of the Workers' Compensation Act had not been established. He recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Board revoke its decision and grant the complainant entitlement.

The Board responded to this report on May 13, 1982. It maintained that when its policy on disablement referred to "a movement which is reasonable to consider has caused the disablement", it did not include "ordinary work ... without any element of something unusual, unless a causal relationship can be established." The Board also maintained that the specialist in internal medicine incorrectly characterized the complainant's work as "forceful", and that the neuropsychiatrist's reference to tendinitis as a possibility was mere speculation. The Board felt that the neuropsychiatrist provided the best diagnosis of the complainant's condition. After reviewing this response, the Ombudsman remained of the opinion that the complainant's disability arose out of and in the course of her employment.

The Ombudsman then exercised his discretion and referred the matter to the Premier.

Ongoing discussions continued between the Ombudsman and the Board. An agreement was eventually reached concerning disablement arising out of and in the course of employment. The agreement was reported in the Ombudsman's Tenth Report.

The complainant was advised that the Board might reconsider its previous decision in light of the report. She therefore requested a reconsideration in light of the agreement; this request was denied. The Ombudsman therefore decided to report the results of the original investigation to the Legislature in his Eleventh Report.

DETAILED SUMMARY NO. 12

The complainant approached this Office on October 2, 1981 with a complaint against a decision of the Appeal Board of the Workers' Compensation Board dated January 16, 1981. The complainant contended that the Appeal Board was unreasonable in denying him entitlement for personal injury as arising out of and in the course of his employment. The Appeal Board had concluded that, "in the absence of any evidence of an accident on or about May 18, 1979, personal injury arising out of and in the course of the complainant's employment has not been established".

On October 8, 1981, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was invited to make a statement of the Board's position on the complainant's claim.

On October 16,, 1981 the Vice-Chairman of Appeals responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to two members of our investigative staff. The complainant's Workers' Compensation Board claim file supplied by the Board was thoroughly reviewed, and the relevant legislation and Board policy and practice in relation to the issue was considered.

The investigation revealed that the complainant developed a blister on his right foot while working as a quality control inspector. A diabetic who used 80 units of insulin per day, the complainant left Toronto on May 18, 1979 to work for his employer on a job site in the Sierra Mountains in Argentina.

The flight to Buenos Aires was scheduled to take 13 hours. The complainant was wearing a pair of "western-type boots" which he had purchased nine months before. The complainant's flight was delayed in Lima, Peru for about 12 hours, four of which the complainant spent in the airport, eight in a hotel. The complainant noticed a blister on his right big toe in the Lima hotel. He bathed the toe in water and covered it with a bandage.

Upon arriving in Buenos Aires, the complainant was forced to wait four hours in the airport before he received word that the airline had lost his luggage and with it the bulk of his insulin and a change of shoes and clothing. After an eight-hour hotel rest, the complainant boarded a plane which took him to Cordoba, where he waited another two hours before he received car transportation to the job site in the interior. The blister was swelling badly by this time. He still had no change of footwear as his luggage had not been found.

The day after the complainant arrived on the job site, wearing his Western boots became impossible because of the swelling. A co-worker lent him a pair of construction boots that were 1/2 size smaller than his normal size nine. However, he could get them on and they were more appropriate for the job site. His luggage had still not arrived and the location and demands of his work were such that he was unable to purchase appropriate footwear.

The complainant worked 12 hours a day for the next six days, walking and climbing constantly. The blister continued to swell until May 28, 1979 when the complainant found that he could not put on even his borrowed boots. His supervisor immediately ordered him to see a doctor in Cordoba.

Doctors in Cordoba diagnosed gangrene and suggested partial amputation. The complainant wished to return to Ontario for treatment and did so on June 9, 1979. He was immediately admitted to hospital, where he received a series of amputations over the course of the next two months which left him without a leg below the right knee.

The complainant submitted a claim for compensation. The accident employer advised a Board investigator on November 8, 1979 that it was requesting "speedy adjudication" of the claim and further requested "that (the Board) make all provisions to allow entitlement under the Act for this claim".

During the course of this Office's investigation, the Ombudsman, reached the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that "the Appeal Board in its decision dated January 16, 1981 was unreasonable to deny entitlement for personal injury arising out of and during the course of the complainant's employment". He advised the Chairman and the accident employer of his possible conclusion and recommendation in a letter dated November 10, 1982. The Ombudsman pointed out:

> ... the Appeal Board made specific reference to the complainant's twenty year history of diabetes. This would not appear to be a relevant consideration as the Board's Medical Advisor in memorandum #8 dismissed any relationship between the insulin intake and the infected blister. I have therefore also dismissed this concern.
>
> It would appear that the only issue is whether or not the complainant's blister arose out of and in the course of his employment.
>
> The evidence appears to indicate that the complainant was in the course of his employment at the time the blister developed. This is substantiated by the fact that he was travelling for the employer at the time and his employer acknowledges that he was in the course of his employment. This is also confirmed by the Board's Claims Adjudication Procedures Manual's section titled "Travel on Employer's Business", which states the following:
>
> > Where the conditions of the employment require the employee to travel away from the employer's premises, the employee is considered to be in the course of the employment continuously, except where a distinct departure on a personal errand is shown.

As it would appear that the complainant was in the course of the employment at the time the blister developed, section 3(2) would seem to apply. Specifically, because the complainant was in the course of his employment when the blister developed, it would appear that it must be presumed that it arose out of his employment. This presumption, of course, could be rebutted by contrary evidence. However, the Board has not referred to any contrary evidence in its decision.

The only other logical cause for the development of the blister would appear to be the boots, which he claims to have worn for nine months prior to the incident without problem.

It is true that the mechanical cause of the blister was the friction between the boot and the complainant's toe. However, it was the extraordinary circumstances that arose during the course of the complainant's employment that caused him to wear his boots for an extended period of time, and set the stage for the formation of the blister.

The Ombudsman tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, "that the Appeal Board revoke its decision of January 16, 1981 and award the complainant entitlement to compensation benefits for his disability which eventually led to the amputation of his leg".

In a letter dated April 13, 1983, the Ombudsman received submissions to his section 19(3) letter from the accident employer's solicitor, who argued that the complainant's claim could only be viewed as an industrial disease and as his disability could not be considered an "industrial disease", the provisions in the Act and Regulations dealing with same did not apply. Alternatively, it was argued that the complainant did not establish that he had suffered an "accident" as contemplated by section 3(1) and therefore the presumption in section 3(2) did not apply.

The Chairman of the Board responded on January 24, 1983. He stated that the Board considers blister claims: (a) "where the blister results from any process involving continuous friction" as indicated in Schedule 3 of the Workers' Compensation Act; and (b) when the blister is "caused by footwear worn at work" under Claims Adjudication Branch Procedures Manual, Document 33-13-06, Page 1, Section 2. The Manual stipulates that, when the blister arises from "footwear worn at work", the worker is held responsible for the injury if he supplied the footwear. He then pointed out that, when his blister developed, the complainant was not engaged in a "process involving continuous friction", and was wearing footwear which he had supplied. The Chairman also stated that the complainant's representative claimed before the Appeal Board that the blister resulted from a particular accident and not the use of the boots per se. The Board apparently agreed that the boots "were not a factor", but found no causative accident. It also considered entitlement under "disablement" in section 1(1)(a)(iii), but did not find "something about the work which can be considered to have caused the disablement to come on". He concluded by stating that the Board would not implement the Ombudsman's tentative recommendation.

The Temporary Ombudsman considered this case in light of our investigation and the representations of the Board and the accident employer.

It appeared to the Temporary Ombudsman that the Board's policy concerning "infected blisters" pertained primarily to industrial employment. The schedule sets out two columns - one for the description of the disease, the other for the process. The only relevant entry is "infected blisters" which is matched in the second column with the words "any process involving continuous friction". The reference to "process" in Schedule 3 of the Act and Document 33-13-06 in the Temporary Ombudsman's opinion refers to an activity or process which is peculiar to a worker's form of employment. Entitlement under Schedule 3 of the Regulations and section 122 of the Act is relevant when the worker is engaged in an activity that is peculiar to his job. The complainant was obviously not so engaged when he was on the plane and, accordingly, the provisions of the Act and Regulations dealing with Industrial Diseases do not apply. There was therefore no dispute on this issue.

The Board indicated that in addition to Industrial Disease claims it adjudicated other claims for "infected blisters". One factor in such claims was whether the worker supplied his own footwear when the blister was "caused by footwear worn at work". It is clear that the complainant supplied his own footwear. However, for disentitlement to flow from this aspect of the Board's policy, it would have to be established that the boot alone caused the blister. If the complainant's boot had been the only cause of the blister, it would appear that the application of this policy might be justified because a relationship between the work and the disability would not be established. However, in the complainant's circumstances, the Temporary Ombudsman was unable to establish that the boots were the only or primary cause of the blister.

As the employer indicated, the complainant did not suffer a specific incident; however, the definition of accident in the Act does provide for disablement. The consideration then appears to be whether the development of the blister could be considered "disablement" under section 1(1)(a)(iii). The Board stated that it did not find "something about the work which can be considered to have caused the disablement". The Ombudsman indicated in his November 10, 1982 letter that, given the presumption in section 3(2) of the Act, the complainant did not have to establish a causal relationship between the blister and "something about the work".

As noted by the Ombudsman, the complainant's blister arose "in the course of" his employment on the trip to Argentina. The presumption in section 3(2) thus requires evidence to be adduced to show it did <u>not</u> "arise out of" the employment in order to justify denying entitlement. The Ombudsman pointed out that such evidence had not been adduced and concluded, further, that the available evidence established an inference in favour of entitlement. The Temporary Ombudsman agreed with this view and noted that the complainant comfortably wore his boots for nine months before his Argentina trip; he encountered several delays on the trip which forced him to wear his boots for an inordinately long period of time. The Temporary Ombudsman noted that it was reasonable to infer that the delays, which clearly arose during the course of the complainant's employment and were beyond his control, were an integral part of the circumstances which set the stage for the formation of the blister and its subsequent complications.

The Temporary Ombudsman therefore concluded, pursuant to section 22(1)(b) of the <u>Ombudsman Act</u>, that it was unreasonable for the Board to have denied the complainant entitlement for personal injury arising out of and in the course of his employment. He recommended, therefore, pursuant to section 22(3)(g)

of the Ombudsman Act, that the Appeal Board revoke its decision of January 16, 1981 and grant the complainant entitlement to compensation benefits for his disability which led to the amputation of his leg.

In a letter dated February 27, 1984, the Chairman of the Workers' Compensation Board advised this Office that the Board would not be implementing the Temporary Ombudsman's recommendation in this case.

The Chairman's letter stated the following, in part:

> The Board cannot agree that the decision of the Appeal Board was unreasonable. In coming to this conclusion, the Board took careful note of [the Temporary Ombudsman's] response to the explanation of the panel's decision as set forth in my letter of January 24, 1983. It seems that there is no dispute that the complainant did not suffer an "accident", and that the question of entitlement is contingent on a finding that he meet the criteria for "disablement" as contemplated by Section 1(1)(a)(iii) of the Workers' Compensation Act.
>
> In my letter of January 24, 1983, I explained why, in the Appeal Board's view, the complainant did not meet this criteria. Essentially, the Appeal Board did not consider that there was "something about the work that caused the disablement'. The presumption in Section 3(2) applies only after an "accident" or disablement within the meaning of Section 1(1)(a)(iii) has been established. The Board submits that Section 3(2) cannot be used to make a determination of whether a worker meets the criteria for disablement.
>
> As [the Temporary Ombudsman] has conceded that no "accident" as contemplated by Section 1(1)(a)(i) and (ii) took place, and since he has not established that the criteria for "disablement" pursuant to Section 1(1)(a)(iii) have been met, the Board has concluded that the decision of the Appeal Board was correct....

Having reviewed the position of the Ombudsman and subsequently of the Temporary Ombudsman, and the Board's position in this claim, the Ombudsman was in agreement with the views previously expressed by his Office. As such, the Ombudsman was of the opinion that the Board's position was unreasonable and that insufficient arguments had been presented by the Board to warrant a change in position to be taken by this Office.

The Ombudsman therefore exercised his discretion and referred the matter to the Premier on March 30, 1984. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 13

This complaint against the Workers' Compensation Board was brought to the attention of this Office in a letter dated August 20, 1982. At that time, the complainant advised that he was dissatisfied with an Appeal Board decision dated May 4, 1979, which denied him entitlement to compensation benefits for the period

from February 19, 1977 to August 20, 1977, for a low back injury arising out of a compensable accident on February 19, 1977.

By letter dated December 7, 1982, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint, pursuant to the requirements of section 19(1) of the Ombudsman Act. He was also asked if he wished to provide a statement respecting the Board's position.

The Assistant Secretary responded on the Chairman's behalf, indicating that the issue to be investigated had been dealt with by the Appeal Board, and the Board therefore did not have a statement to make at that time.

The complaint was subsequently assigned to two members of the Ombudsman's investigative staff.

The investigation carried out by our Office consisted of a thorough review of the Workers' Compensation Board claim file documentation, discussions with the complainant and his accountant, legal research, and a review of the relevant legislation and Board policies.

Our Office's investigation has revealed that the complainant was injured on February 19, 1977. At that time, he was, by verbal agreement, employed by a lumber company to cut and skid trees. He was paid on a piece-work basis and he used his own skidding machine in return for a 7% premium on the amount earned.

The complainant was forbidden to work elsewhere while in the employ of the lumber company.

When he was hired, the complainant was issued a copy of a document entitled "Information to Cutters" which, as well as setting out terms of employment, stated that:

> Working Schedule: From Monday to Friday (take note that several times during winter we repair the roadway, frosting, etc. The roadway is therefore closed during those weekends. No one can make use of it).

All cutters customarily left their skidders parked in the bush at the job site, after a day's work. One Saturday morning, on February 19, 1977, the complainant arrived at the job and, in the course of changing a flat tire on his skidder, injured his back.

In a letter to the Board received on November 20, 1978, the complainant's manager indicated that he saw the complainant at approximately 11:45 a.m. on February 19, 1977, as he was leaving the job site. The complainant apparently advised the manager that he was taking a tire to town to be fixed, so that his skidder could be operated on Monday. He apparently did not mention that he had hurt his back.

The complainant visited a chiropractor, Dr. A., on February 21, 1977, who diagnosed a mild lumbosacral disc herniation and prescribed chiropractic manipulation three times weekly. X-rays taken the same day revealed evidence of thinning of the fifth lumbar disc and osteophytic formation between L2-3 and L3-4.

On March 24, 1977, the complainant was examined by a physician, Dr. B., who confirmed Dr. A.'s diagnosis.

The complainant's claim was initially allowed by the Board; however, on April 19, 1977, the Claims Review Branch disallowed it, on the basis that he was, at the time of his injury, in the act of repairing his own skidder on a non-scheduled work day.

The Appeals Adjudicator hearing took place on May 3, 1978, at which time the complainant stated that he worked at the job site on the date in question, until approximately 8:30 a.m., when he noticed the skidder's flat tire. He then indicated that he often worked on Saturdays, and was in fact paid for the work performed on Saturday, February 19, 1977.

Two of the complainant's co-workers, who were subsequently contacted by the Board, indicated that they never worked on Saturdays, and were unaware of any workers who did so.

The complainant's manager indicated that he could not tell from his records whether or not the complainant had worked on February 19, 1977, since workers were paid on a piece-work, rather than daily, basis; however, Saturday was not considered by the company to be a working day.

The complainant's appeal was denied on December 8, 1978.

The matter came before the Appeal Board on May 2, 1979. In its decision dated May 4, 1979, the Board noted:

> ... there is no evidence on record to show that the complainant had performed work for [the lumber company] on February nineteenth, 1977. The Appeal Board notes and accepts that the complainant was in the bush on February nineteenth, 1977 for the sole purpose of changing a tire on his skidder. The Appeal Board therefore concludes that it has not been shown that the complainant's low back injury arose out of and in the course of his employment on February nineteenth, 1977.

During the course of our investigation, the Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(c) of the Ombudsman Act, that:

> ... the Appeal Board's conclusion that the changing of the tire on the skidder by the complainant was not incidental to his employment was based on a mistake of law.

In the alternative, the Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that:

> ... the Appeal Board decision, which concluded that the complainant did not have entitlement for a disability in the low back because he was in the bush at the time of the injury for the sole purpose of changing a tire on his skidder, was unreasonable.

In a letter dated July 7, 1983, the Ombudsman advised the Chairman of the Board of his tentative conclusions and his consequent tentative recommendation. In support thereof, he indicated that:

> It appears to be established law that, to come within the statute, the accident could have occurred while the worker engaged in an incident of

work. See Workmen's Compensation Board v. C.P.R. and Noell [1952] 3 D.L.R. 641 (S.C.C.) Rand, J. at 646.

In the case of Betts & Gallant v. Workmen's Compensation Board [1934] 1 D.L.R. 438 (S.C.C.), Mr. Justice Crocket follows Lord Atkinson's explanation of what is incidental in the case of St. Helens Colliery Co. v. Hewitson [1924] A.C. 59. Lord Atkinson is quoted at page 445:

> ... a workman is acting in the course of his employment when he is .... doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service.

In the case of Re Kinney and Workmen's Compensation Board (1972), 27 D.L.R. (3d) 703, Mr. Justice Hughes of the New Brunswick Court of Appeal cited, as a principle to be followed, a passage in 34 Hals., 2d ed., pages 822-823:

> The words "arising out of the employment" mean that, during the course of the employment, injury has resulted from some risk incident to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered.

Lord Wrenbury considered the exigencies of duty as work-related when he held in Armstrong, Whitworth and Co. Ltd. v. Redford [1920] A.C. 757 (House of Lords) that a worker who had slipped and injured herself as she hurried back to work from a lunch break was entitled to recover. He stated at page 780:

> In the present case I say no more than that I think that the girl was in the course of her employment when, in hurrying down the stairs to achieve punctuality in "clocking on", she was endeavouring to comply with the duty of punctuality which she owed to the employer, ...

In a decision of the British Columbia Workers' Compensation Board, Re Unauthorized Activities, Decision No. 230, B.C. W.C.B. Reporter, at page 83, the following principle is set out:

> ... an act which is done bona fide for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer.

Lastly, the Claims Adjudication Branch Procedures Manual, Document Number 33-14-01, Page No. 1, s. 1(c), dated February 23, 1981 describes the following situation as entitling a claimant to benefits:

> if the employee is injured on the employer's premises while doing something to get equipment or materials ready for work, that is being done in the interest of the employer.

The Ombudsman concluded his letter with these comments:

In support of these possible conclusions, I wish to point out that the following two basic issues appear to have emerged from the Appeal Board's decision of May 4, 1979: (1) whether the nature of the activity engaged in by the worker - i.e. repairing his skidder - could be considered as forming part of that which the worker was employed to do; and (2) whether his engaging in that activity on a Saturday - the day in which he was not authorized to "work" - would preclude the characterization of that activity as arising out of and in the course of employment.

1. Regarding the first issue of whether the repairs formed part of the complainant's employment, it is reasonable to assume that a mechanical work tool like the skidder would at some point necessitate repairs and that, to enable the complainant to continue the work which he was bound to do, he would have to carry out repairs without which he could not do his work. Given that the skidder, by definition, could not be used for any other purpose than a work-related activity, and that the skidder operator could work for none other than [the lumber company] while in [that company's] employ, it is reasonable to believe that the workman would not otherwise have incurred the risk incident to the act of changing the skidder tire unless engaged in the duty of log cutting owing to [the company]. It would appear that, although the complainant was responsible for his own repairs, he was, in carrying them out, doing something in discharge of his duty to his employer indirectly imposed upon him by his contract of service.

2. Regarding the second issue as to whether the complainant's performance of the skidder repairs on a weekend would remove that activity from the realm of his employment, it could well be argued that, like the worker in the case of Armstrong, Whitworth cited above, the complainant was endeavouring to comply with the duty owing to his employer by arranging to have the tire fixed so that his skidder could be in operation by Monday morning.

Furthermore, as suggested by the Commissioners of the British Columbia Workers' Compensation Board in the above-noted Decision No. 230, not only were the repairs undertaken to advance the employer's business but, although not specifically authorized by the employer, there was no specific reference in the terms of employment concerning the repair of the skidder. The cutters were not allowed to "work", that is - to cut logs, on weekends, but no mention was made of repairs by the employer. The terms of the worker's employment did not prohibit his going into the bush on a Saturday to do something incidental to the employment. Indeed, there could not have been any reason for the employer to have prohibited such repairs on a Saturday, given that the reason for not permitting work on weekends was to allow the employer to carry out maintenance repairs to the roadway. The repairing of skidders, all of which were left parked on the job site, could not be said to interfere with such road repairs.

It could be said, moreover, given that, on principle, cutters were permitted to work at any, and all, hours of the day during weekdays, that it was conceivable that a zealous round-the-clock cutter should only have the weekend to carry out the necessary repairs to his skidder and that the employer would have contemplated that possibility.

The Ombudsman's letter of July 7, 1983, concluded with the following tentative recommendation:

> It may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision dated May 4, 1979 and grant the complainant entitlement to a low back disability as arising out of and in the course of his employment on February 19, 1977.

The Chairman responded by letter dated October 14, 1983 stating that:

> The Appeal Board is of the view that the case law identified on Page 3 of [the Ombudsman's] letter is not relevant in terms of influencing a decision of the panel. Section 75(1) of the Workers' Compensation Act provides that "The Board has exclusive jurisdiction to examine into, hear, and determine ..." (emphasis added) the matters identified, including a claim for Workers' Compensation benefits. The Appeal Board takes this to mean that its discretion in making such determination ought not to be fettered by court decisions in this and other jurisdictions. Furthermore, Section 80, subsection 1, of the Workers' Compensation Act sets out the principle on which decisions are made, by providing that:
>
> > "Section 80.-(1) Any decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing".
>
> The Appeal Board takes this as lending support to its views that case law ought not to be a determinative factor in the adjudication process. This, of course, is not to say that there may not be cases where the test applied by the courts happens to be consistent with a test used by the Board in similar circumstances. It does not, however, mean that the Board used the test because it was one used by the court.
>
> With regard for the merits of the complainant's case, the panel notes that your investigation thus far makes no reference to the Claims Adjudication Branch directive of October 15, 1976. For your information, the entire directive is set out below. In addition, I have attached the background memorandum on which it is based.
>
> > "Directive 20. Coverage For Persons Who Own Equipment Used To Perform Their Work And Injured While Working On That Equipment.
> >
> > If the work being done is emergency repairs and the man is in the course of his employment with his employer it would be considered that accident arose out of the employment and entitlement granted. i.e. a machine breaks down in the bush at 2:00 p.m. and the man is busy repairing the machine when the accident occurs at 2:30 in the afternoon.
> >
> > If accident occurs while the man is performing repairs or maintenance to the machine and the accident takes place while the man is not in the course of his employment, i.e. after hours, no entitlement is granted.

> I should point out that this is a directive for the guidance of Claims Adjudicators, rather than a Board approved policy. While the Appeal Board did not consider itself bound by this directive, it agreed with the principle involved and concluded that the complainant was not in the course of his employment when the alleged incident occurred. I should also add that the excerpt quoted on Page 4 of your letter, from the Chaims (sic) Adjudication Branch Procedures Manual, has always been taken to mean equipment or materials owned by the employer. This procedural directive is therefore not inconsistent with Directive 20 quoted earlier.
>
> In view of the foregoing, the Appeal Board cannot agree with your tentative conclusion and will accordingly not implement your tentative recommendation.

Before reaching any final conclusions respecting the complaint, the Temporary Ombudsman carefully noted all of the facts involved as outlined in the Ombudsman's letter of July 7, 1983, as well as the Board's response contained in the Chairman's letter of October 14, 1983.

With respect to the Ombudsman's tentative conclusion that the Appeal Board's decision was based upon a mistake of law, the Temporary Ombudsman did not make this conclusion final as in his view the decision was better considered in terms of its reasonableness. However, the Temporary Ombudsman did wish to point out that he disagreed with the Board's opinion that case law should not be a "determinative factor" in deciding entitlement.

With respect to the tentative conclusion that the Appeal Board's decision was unreasonable, however, the Temporary Ombudsman was of the view that the Board's response did not constitute a significant refutation of the information contained in the Ombudsman's letter of July 7, 1983. In the Temporary Ombudsman's opinion, the Appeal Board's reliance upon Claims Adjudication Branch Directive No. 20, a "Directive For The Guidance Of Claims Adjudicators", rather than a Board approved policy, was unreasonable. In addition, it was the Temporary Ombudsman's view that the Appeal Board should have considered the persuasive value of relevant legal precedent in reaching its decision in the complainant's case.

With respect to the merits of the Claims Adjudication Branch Directive, it is clear that any accident occurring while repairs are being performed to equipment outside normal working hours is non-compensable. This, in the Temporary Ombudsman's view, was overly simplistic, because the issue to be determined is whether the act in question was performed for the benefit of the employer, and not whether it took place within a particular time span.

Accordingly, it was the Temporary Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, by decision dated May 4, 1979, unreasonably denied the complainant compensation benefits from February 19, 1977 to August 20, 1977 for a low back disability arising out of a compensable accident on February 19, 1977.

It was therefore the Temporary Ombudsman's recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant entitlement to compensation benefits from February 19, 1977 to August 20, 1977.

The Board did not respond to the Temporary Ombudsman's recommendation, which was contained in a report dated January 30, 1984. The Ombudsman therefore referred the matter to the Premier on March 30, 1984. The complainant was apprised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 14

The complainant registered his complaint against the Workers' Compensation Board with this Office on February 23, 1982. The complainant contended that the Appeal Board, in its decision dated September 15, 1981, was unreasonable in finding that the leg injury sustained on December 21, 1979 did not arise out of and in the course of his employment.

On July 8, 1982, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint, in accordance with the requirements of section 19(1) of the Ombudsman Act. This notice also outlined some of the Board policies which might be relevant to the issue raised by the complainant and asked the Chairman to comment on their applicability.

On behalf of the Chairman, a reply was received from the Assistant Secretary on August 18, 1982. He specifically addressed each of the policies outlined in the section 19(1) notice and commented that as the fact situation in the complaint did not conform to the policies, they were therefore not applicable.

The investigation of this complaint was then assigned to two members of our investigative staff. During this investigation, my investigators conducted a thorough review of the complainant's Workers' Compensation Board claim file which was supplied by the Board. In addition, they obtained further information from the complainant, and carefully considered the relevant legislation, policy and practices of the Workers' Compensation Board in relation to this issue.

The investigation carried out by this Office indicates that the complainant, a bus driver for a public transportation company since 1953, was injured on December 21, 1979 when he was struck by a car. At the time of the accident, the complainant had just completed his shift, and had left his bus to the relief driver. He carried with him the trip report for that shift, and was planning to return to the depot, hand in the report to the dispatcher, pick up his car, and go home. In order to return to the depot, he had to cross the street and board a bus travelling in the opposite direction. Unfortunately, as he crossed the street, the complainant slipped, fell, and was struck by a passing automobile. He suffered a serious compound fracture of both bones in his left leg as well as other minor injuries. He received temporary total benefits for 55 weeks until he returned to work on January 18, 1981.

The employer initiated an appeal claiming the complainant was not injured while in the course of his employment and therefore had no entitlement to collect benefits under section 3(1) of the Workers' Compensation Act. The Claims Review Branch denied the employer's appeal. However, the employer later succeeded before the Appeals Adjudicator and the Appeal Board. The Appeal Board found on September 15, 1981 that the complainant was no longer in the course of employment

at the time of the accident as he was returning to the depot in large part because his car was there and not for the purpose of personally delivering the trip reports.

It was established in the course of the investigation undertaken by our Office that the employer has a Manual which governs procedures to be followed by drivers. Under a section entitled "Trip Reports" the Manual states that the operator or driver is required to maintain an accurate trip report, and to remit this report to the dispatch office daily. The Manual is silent as to the manner in which the trip report is to be returned to the depot. The investigation revealed that most drivers turned trip reports over to the relief driver and the last driver of the day on that bus returned all reports to the dispatcher. However, some of the drivers returned trip reports to the dispatcher personally. The employer had over many years not commented on nor disapproved of either method of remitting trip reports. The complainant had personally returned his trip reports for several years. In fact, on several occasions when he had not brought his car to work, he still returned to the depot to personally remit the trip report. He provided the Appeal Board with testimony to this effect.

During the course of the investigation, the Ombudsman formed the view that,

> It would appear that it might be open to me to conclude pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board's decision that [the complainant] did not sustain a personal injury by reason of an accident arising out of and in the course of his employment was unreasonable.

In a letter dated May 6, 1983, the Ombudsman advised the Chairman of the Board and the employer of this possible conclusion and consequent recommendation. In support of the possible conclusion and recommendation he pointed out that:

> 1. The [employer's] manual contains the rules and regulations for bus drivers. Its wording makes it clear that a responsibility is imposed on each bus driver to ensure that his trip reports are handed in daily to the dispatcher. It does not specify any particular manner in which this duty should or should not be performed.
>
> 2. [The complainant]'s established practice had been to hand in his trip reports personally to the dispatcher. His method of performing the duty imposed by the company was never forbidden or disapproved of by [the employer].
>
> 3. [The complainant]'s actions in personally delivering his trip reports were technically correct and moreover were in the best interest of his employer, [the employer].
>
> 4. The employer stated that [the complainant] was not doing anything wrong by handing in his trip reports personally to the dispatcher.
>
> Therefore the method chosen by [the complainant] to perform a duty of his employment did not constitute a distinct departure on a personal errand and did not take him out of the course of his employment at the time of his accident, even though this method of performing his duty

> also returned him to the place where he had parked his car. Merely because an employee chooses to perform a work duty in a manner which is convenient to him personally, does not take him out of the course of his employment. To maintain that the duty is not to hand in one's reports personally, but merely to see that they are handed in, and that therefore handing them in personally takes one out of the scope of his employment, is to define employment too narrowly.

The letter of May 6, 1983 went on to state that:

> It would appear that it might be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act that the Appeal Board revoke its decision and restore to [the complainant] entitlement to benefits for the broken leg he suffered on December 21, 1979.

The Chairman, in his response to our letter of May 6, 1983, stated that the Board remained of the view that the complainant was performing a personal errand at the time of the accident and that the Board was convinced it had applied the correct test in arriving at this conclusion. He went on to state that the test in question was first used in a New York case, Marks' Dependents v. Gray 251 N.Y. 90, 167 N.E. 181 (1929). He quoted a portion of this decision in his letter. The quotation would indicate that, according to that decision, where an employee is travelling both on a personal errand and an errand for his employer, if the trip would have taken place whether or not the business purpose existed, then the travel is personal in nature and therefore not within the scope of employment. In addition, the Chairman relied upon the written decision of the Appeals Adjudicator in this matter where the Adjudicator noted that a Board investigator had been told by the complainant that had it not been for the fact that his car was parked at the depot, he would have handed in his trip reports to the relief driver.

The employer also responded to our letter of May 6, 1983. The employer argued that while the complainant had claimed to have a habit of personally returning his trip reports to the dispatcher, on specific dates in August, 1981 and May and June, 1983, he did not do so. Additionally, the employer expressed concern that a decision favourable to the complainant would broaden the scope of employment to include drivers on split shifts during the time between shifts.

Upon receipt of the letters from the employer and the Chairman of the Board, further information was obtained from the complainant. He stated that after his accident, having been told by his employer during Workers' Compensation Board appeals that the usual practice was to leave such reports with the relief driver, he himself commenced to do so. The practice therefore changed after his accident, in part due to the statements made by the employer to the Board. The complainant also advised upon questioning that he had to commence his work day at the yard as he took a fresh bus out of the garage. For this reason, his car had to be parked near the depot.

Further investigation was also conducted into the Chairman's contention that the complainant had advised a Board investigator that he would not have returned to the depot had it not been for the fact that his car was parked there. Upon examination of the Board files it became clear that an investigator had recorded in a memorandum dated September 11, 1980 that he had interviewed the complainant. The memorandum indicated that, upon questioning, the complainant

stated that when he had previously worked on a different route, he would not have returned to the yard unless his car was parked there. Upon further questioning by the investigator from our Office, the complainant stated that his habit for the past number of years had been to return to the depot to remit the reports to dispatch whether or not his car was parked there, and that on several occasions when he had taken a bus to work, he had still personally remitted his reports.

The New York case referred to by the Chairman in his response to our letter of May 6, 1983 was researched and updated by members of our staff. In addition, research was undertaken into Canadian jurisprudence with respect to the scope of employment in similar cases. This research indicates Judge Cardozo stated in his decision in Marks' Dependents v. Gray that the employee would remain within the scope of employment if a business purpose was at least the concurrent cause for the journey in question. This decision was re-examined by subsequent New York courts. For example, in Skinner v. Tobin Packing Co. 233 N.Y.S. 2d 900 (1962), a decision of the New York Superior Court it was held that it was debatable whether Marks' Dependents v. Gray established a dominant purpose test. The employee in the Skinner case was killed while travelling to his home and sales territory in Kingston from Albany where his pregnant wife sometimes spent weekends. The employee also had some collections and orders at the employer's plant in Albany. The court held that the applicable test should be whether the journey in question had a business purpose concurrent to the personal purpose. Where such a business purpose existed, the employee remained within the scope of employment and there was no need to establish whether the business purpose was a dominant cause of the journey.

An examination of the Canadian case law would indicate that an employee remains within the scope of employment so long as he performs a task reasonably incidental to his work. For example, in Betts and Gallant v. The Workmen's Compensation Board, [1934] S.C.R. 107, the Supreme Court of Canada held that an injury to an employee may occur within the scope of employment so long as he does something which is reasonably incidental to the contract of employment. Another decision of the New Brunswick Court of Appeal held that even where employees are not performing duties within the normal range of their employment but they are nevertheless furthering the employer's business, they remain within the scope of employment (Re Kinney and Workmen's Compensation Board (1972) 27 D.L.R. (3d) 703 (N.B.C.A.)). Canadian case law clearly indicates that only a limited connection with employment is necessary in order to bring an employee within the scope of employment.

Before reaching a final conclusion in this case, the Temporary Ombudsman again carefully considered all of the factors involved including those outlined in the letter of May 6, 1983, the responses from the Workers' Compensation Board and the employer, and the additional information obtained by our Office.

The Temporary Ombudsman was of the view that the responses forwarded by the Chairman and the accident employer do not provide sufficient reasons which would cause him to alter the possible conclusion and subsequent possible recommendation as outlined in the Ombudsman's letter of May 6, 1983.

The Temporary Ombudsman noted that the employer held each driver personally responsible for the return of trip reports to the dispatch office. For several years prior to the accident, the complainant had been in the habit of personally delivering his reports to the dispatch office. He noted further that

the complainant had changed his habit since the employer appealed the Workers' Compensation Board decision to grant benefits. The employer in this instance developed the policy with respect to the driver's personal responsibility for the remittance of trip reports. However, the employer did not outline any required method for fulfilling the policy. In fact, it condoned two different methods over many years, one of which extended the time during which the employee remained within the scope of employment. After having condoned this particular method of remitting trip reports for a number of years, the employer cannot later argue that the employee was not within the scope of employment while performing this task.

The Temporary Ombudsman noted further that an examination of the case law in this area reveals that so long as a business purpose is reasonably incidental to the activities undertaken by a worker at the time he is injured, he comes within the scope of employment. As this area of the law has been extensively considered by Canadian jurisprudence, he was not persuaded by the Board's submission of case law from another jurisdiction, especially in view of later decisions which have modified the views therein expressed.

Finally, the Temporary Ombudsman did not share the concerns of the employer in this matter that a favourable decision to the complainant would bring other drivers within the scope of employment during the period between shifts when they are working a split shift. The Temporary Ombudsman was of the view that should this issue arise in such an instance, the activities of the driver at the time would have to be examined to establish whether or not he was in fact undertaking a specific task for the employer. A decision with respect to the complaint is specific to the particular facts of his case.

It was therefore the Temporary Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board decision of September 15, 1981 was unreasonable in failing to find that the complainant's accident arose out of and in the course of employment pursuant to section 3(1) of the Workers' Compensation Act. The Board failed to give adequate weight to the fact that the complainant was at the time returning his trip report to the depot, a duty required of him by his employer. The Board at the same time gave undue weight to the fact that the complainant also had to return to the depot in order to get his car. In the Temporary Ombudsman's view, the concurrent business purpose for the trip was not negated by the personal purpose and therefore the complainant was in the course of his employment at the time of the accident.

It was therefore the Temporary Ombudsman's recommendation, pursuant to section 23(3)(g) of the Ombudsman Act that the Appeal Board revoke its decision and restore to the complainant entitlement to benefits for the broken leg he suffered on December 21, 1979.

The Board was notified of the Ombudsman's opinion and recommendation in a report dated December 7, 1983. On February 24, 1984, the Chairman responded on behalf of the Board. He advised that the Board continues to adhere to the view that the scope of employment had not been extended simply because the complainant was returning trip reports. He also stated that in the Board's view, the duty to return trip reports extended only to the first reasonable opportunity to return them, and that otherwise the scope of employment would be unreasonably broadened.

The Ombudsman carefully reviewed the Chairman's response and found that the Board had not provided him with any additional reasons which would cause him to alter the opinion and recommendation in this case. He therefore exercised his

discretion under section 22(4) of the Ombudsman Act and referred the matter to the Premier on March 30, 1984. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 15

The complainant registered his complaint against the Workers' Compensation Board during an interview at our Office in Toronto on October 18, 1982. The complainant advised that he was dissatisfied with an Appeal Board decision dated October 24, 1978 which concluded that he was not entitled to the payment of temporary total compensation benefits for the period extending from February 9, 1977 to November 4, 1977.

On November 1, 1982, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was asked if he wished to provide a statement of the Board's position. A response was received by our Office in which the Board indicated it did not wish to make a statement at that time. Our file on this complaint was assigned to a member of our investigative staff. He thoroughly reviewed the Workers' Compensation Board claim file related to this complaint, as well as carefully considering the relevant legislation, policy and practices of the Workers' Compensation Board.

The investigation carried out by our Office has revealed that on October 29, 1976 the complainant, a co-owner of a construction company in a town in Ontario, lifted a heavy jack and felt pain in his low back. Three days later, he was examined by his family doctor, Dr. A., whose diagnosis was "lumbosacral strain". A claim was submitted to the Workers' Compensation Board and the complainant received temporary total disability benefits from November 1, 1976 until February 9, 1977, when an orthopaedic specialist, Dr. B., who examined him once on February 1, 1977, indicated that he could return to work. Dr. B. noted, "I made a diagnosis of a resolved lumbosacral strain and in my opinion he is fit to return to his duties."

On April 6, 1977, Dr. A. noted:

> ... in my opinion his type of work is too heavy for his physique. I don't think physically he is strong enough for this type of work yet. He is fit for light work and is improving and could try his own work in another week or so.

On May 10, 1977, the complainant was examined at the Board to clarify the situation arising out of the contradictory reports from Dr. B. and Dr. A. One of the Board Surgical Consultants, Dr. C., and one of the Board Medical Officers, Dr. D., conducted the examination. Dr. D. concluded,

> After an examination by Dr. C. and myself no physical disability was found that would prevent this man from doing his regular work. The claim should be adjudicated following the reports of Dr. B. and Dr. A. which say he can do his usual work also.

On the same day, the complainant was examined by another orthopaedic specialist, Dr. E., who concluded, "... he is suffering from an extruded intervertebral disc." Subsequently, the Board granted the complainant temporary partial disability benefits from February 9, 1977 until May 11, 1977. Benefits appear to have been paid up until the time the complainant was examined by the Board's doctors on May 10, 1977.

In May, 1977, the complainant underwent non-compensable surgery. On the day of his admission to the hospital for this surgery, the complainant began physiotherapy treatments for his back. After a brief interruption for the surgery, the therapy treatments continued regularly from June 7, 1977 until July 5, 1977.

On July 5, 1977, the complainant was examined by a neurosurgeon, Dr. F., who concluded,

> The complainant may well have some degenerative lumbar disc disease. However, he also has an anxiety neurosis. I would suggest that he be admitted to the Compensation Board Hospital and that he be observed and investigated there.

Neither the complainant nor Dr. F. were notified of any action contemplated by the Board concerning Dr. F.'s request. On September 15, 1977, Dr. F.'s secretary wrote to the Workers' Compensation Board to inquire whether or not the Board would be admitting the complainant to the Hospital and Rehabilitation Centre in Downsview as suggested by Dr. F. This letter prompted the admission of the complainant to the Centre on November 4, 1977. Temporary total disability benefits were restored from November 4, 1977 until November 18, 1977, the day the complainant was discharged from the Downsview Centre. The complainant was to return for orthopaedic and psychiatric assessments. The discharging doctor, Dr. D., noted, "This man has been discharged to return to his regular work on December 7, 1977 unless this is contraindicated following his assessments by Dr. G. and Dr. H. on November 30, 1977."

After his assessment on November 30, 1977, Dr. H., a neuropsychiatrist, concluded,

> ... He should be encouraged to return to a gainful occupation despite persisting symptoms, perhaps under somewhat modified working conditions to start with. I do not believe that he would be a proper candidate for formal psychotherapy. The prognosis appears guarded, but could be improved if the complainant could be persuaded to return to work and stick it out, despite persisting symptoms.

Dr. G., an orthopaedic consultant, concluded,

> ... he is quite fit to undertake many types of light to modified work.... I recommend very strongly that he attempt to find this kind of work and keep himself active and after a time he may ultimately be able to get back to doing his former job.

Subsequent to his discharge, the complainant received temporary total disability benefits from November 18, 1977 until his return to self-employed work on June 5, 1978. These benefits were paid pursuant to section 41(1)(b) of the

Act. At the direction of the Appeal Board, the complainant was assessed for a permanent disability pension in December, 1978 and awarded a 10% pension.

The Appeal Board decision, dated October 24, 1978, noted,

> ... Subsequently after a hearing before the Appeals Adjudicator, it was recommended that the complainant be admitted to the Hospital and Rehabilitation Centre for a complete assessment. Following receipt of the discharge report from the Hospital and Rehabilitation Centre, the Appeals Adjudicator concluded in a decision dated March twenty-first, 1978 that the complainant was not entitled to additional compensation benefits subsequent to February ninth, 1977.

Upon our review of the Board claim file, it would appear that in fact the complainant was not admitted to the Centre subsequent to the Appeals Adjudicator hearing. Rather, his file was reviewed by Dr. I., a Psychiatric Consultant, on March 8, 1978. Dr. I. noted,

> The two above opinions [Dr. H. and Dr. G.] concur that the patient should be able to try a modified employment, except under the present circumstances, perhaps with the language barrier he will have a rather hard time to find employment.

The Appeal Board decision also noted, "... the records of hospitalization [May, 1977] make no reference to any continuing back disability." The complainant was hospitalized for an "anal abscess" and no reference was made to his back at all. The Temporary Ombudsman did note, however, that the complainant received physiotherapy treatments 17 times in June, 1977 subsequent to his discharge from the hospital.

The Appeal Board decision concluded,

> ... The Appeal Board finds that the examination of May tenth, 1977 indicated clearly that the complainant was able to return to his regular work. The Appeal Board further finds that the subsequent reports do not establish a continuing compensable disability, during the period in question which prevented the complainant from returning to employment.

I agree that the examination by the Board's medical staff on May 10, 1977 indicated that the complainant could return to his regular work. However, it would appear that subsequent reports establish a continuing compensable disability during the period in question which prevented the complainant from returning to regular employment.

During the course of my investigation, the Temporary Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to conclude that the complainant was not entitled to temporary partial benefits for the period from May 11, 1977 to November 4, 1977.

In a letter dated October 20, 1983, the Temporary Ombudsman advised the Chairman of this possible conclusion and his possible recommendation. In support of the possible conclusion and recommendation, the Temporary Ombudsman noted,

At this stage of our investigation, I am of the tentative view that the Board's decision was not unreasonable to deny the complainant's claim for temporary total disability benefits. However, the Board may have been unreasonable not to have granted the complainant entitlement to temporary partial benefits for the entire period from February 9, 1977 to November 4, 1977. As the complainant did receive temporary partial benefits from February 9, 1977 until May 11, 1977, this letter will focus on the complainant's entitlement to temporary partial disability benefits from May 12, 1977 until November 4, 1977.

In support of this possible conclusion, the Temporary Ombudsman's letter of October 20, 1983 further noted,

... I have noted that the complainant was in receipt of temporary disability benefits from the date of the accident until May 11, 1977 and again from November 4, 1977 until June 5, 1978 when he returned to work. There is no indication on the file that the complainant suffered a recurrence or further exacerbation of his symptoms to account for the payment of further benefits beyond November 4, 1977. Following his discharge from the Board's Centre I also note that the Board's medical advisors (Dr. H. and Dr. G.) recommended a return to modified employment. These recommendations and opinions appear to have been accepted by the Board given the payment of additional benefits. The doctors appear to indicate the complainant had not returned to his pre-accident state and was not capable of returning to his pre-accident employment. This assumption is further supported by the Board's decision to grant the complainant an award in recognition of a permanent disability.

Also before the Board at the time of its decision was the evidence of Dr. A. and Dr. E. which supported the complainant's claim that he was continuing to suffer from a disability related to his accident. Dr. E.'s opinion was supported by findings of limitations of flexion and extension. I also note that Dr. E. referred the complainant for physiotherapy treatments from May 24, 1977 until July 5, 1977.

His letter, dated October 20, 1983, to the Chairman, concluded,

It would appear that it may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and award the complainant temporary partial benefits for the period May 12, 1977 to November 4, 1977.

On November 17, 1983, the Chairman responded,

Your letter of October 20, 1983 suggests the panel should have awarded benefits on the basis of partial disability, and that its failure to do so, was unreasonable. In the Appeal Board's view, the issue of entitlement for temporary partial disability benefits was not addressed at the hearing. Furthermore, the complainant has made no complaint in this regard despite the fact that this very issue was addressed by the Claims Review Branch in its letter of October 1, 1979. In fact, although he was informed of his right to appeal the Review Branch decision, the complainant has not done so.

> While section 15(2) of the Ombudsman Act indicates the Ombudsman may investigate in the absence of a complaint, section 15(4)(a) clearly provides that such investigation may only be done where no further right of appeal or objection, etc. exists.
>
> Under the circumstances, the Appeal Board considers it inappropriate to respond to your tentative conclusion and recommendation, and accordingly, the Appeal Board will not make a response thereto.

In reply to the Chairman, on January 9, 1984, the Temporary Ombudsman wrote,

> I continue to be of the view that the Appeal Board should have considered entitlement to any benefits that may have been owing to the complainant for the period under consideration.

In a letter dated January 20, 1984, the Chairman stated,

> For the reasons set forth in my letter of November 17, 1983 the Appeal Board has declined to offer any comment in respect of the issue of entitlement to benefits under section 41 of the Workers' Compensation Act, in this matter.

Before reaching a final conclusion in this case, the Temporary Ombudsman again carefully considered all of the factors involved, as outlined in his letter of October 20, 1983, and reflected upon the Board's response to that letter and the lack of representations to his tentative conclusion and recommendation contained in that letter.

The Temporary Ombudsman was of the view that the Board's failure to address the merits of his possible conclusion and recommendation was inappropriate. The Board has the authority not only to consider the evidence before it, but also to make inquiries, summon witnesses and inspect premises. When the complainant appeared before the Appeal Board, he was requesting additional entitlement to benefits for the limited time period from February 9, 1977 to November 4, 1977. The Temporary Ombudsman regretted for the complainant's sake that the Board took an overly technical approach in dealing with his case. All the relevant facts were before it. The Board has a statutory mandate to consider the case before it on its true merits and justice. It was the Temporary Ombudsman's view, therefore, that the Board should have considered and inquired into any entitlement possible for the complainant during the time period under consideration.

In his letter of November 17, 1983, the Chairman of the Board referred to section 15(4)(a) of the Ombudsman Act which provides that the Ombudsman may not investigate a complaint if the complainant has a statutory right of appeal or objection or the statutory right to apply for a hearing or review, until the right has been exercised or the time to exercise the right has expired.

Our understanding of the Workers' Compensation Board's current procedure is that an appeal to the Appeal Board is a matter of procedure pursuant to section 74 of the Workers' Compensation Act. Under the current procedure at the Board, a worker has no statutory right to an appeal; in other words, there is no specific statutory provision that the complainant can point to and say it entitles him to

an appeal on the point in issue. Although the Workers' Compensation Board may procedurally grant the complainant the right to appeal, the Ombudsman's jurisdiction under section 15(4)(a) is predicated on the statutory remedies provided by the Workers' Compensation Act, not on the Board's administrative procedures. Therefore, the Temporary Ombudsman was of the opinion that the Temporary Ombudsman was not prohibited from investigating the complaint. Certainly, in the normal course of events, the Temporary Ombudsman would exercise his discretion and not investigate a complaint until the complainant had appealed to the Appeal Board. In this case, for the reasons given above, the Temporary Ombudsman decided not to exercise his discretion to discontinue this investigation.

The Temporary Ombudsman was therefore of the view that the possible conclusion and recommendation were appropriate. In the absence of any comments from the Board on the merits of the case, the Temporary Ombudsman confirmed his position.

Accordingly, it was the Temporary Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to conclude that the complainant was not entitled to temporary partial benefits for the period from May 12, 1977 to November 4, 1977.

It was the Temporary Ombudsman's recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and award the complainant temporary partial benefits for the period May 12, 1977 to November 4, 1977.

This recommendation was included in a report to the Chairman dated February 16, 1984.

The Board had not responded to the report and recommendation by March 30, 1984. The Ombudsman therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 16

The complainant approached this Office on May 12, 1982 with a complaint against a decision of the Appeal Board of the Workers' Compensation Board dated April 30, 1982. The complainant contended that the Appeal Board was unreasonable in concluding that it had not been established that his recurrence of back disability on October 7, 1976 was related to his industrial accident of August 18, 1975.

On May 26, 1982, the Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was invited to make a statement of the Board's position on the complainant's claim.

On June 4, 1982, the Assistant Secretary of the Board responded on the Chairman's behalf, stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of our investigative staff. She thoroughly reviewed the complainant's Workers' Compensation Board claim file supplied by the Board, and considered the relevant legislation and Board policy and practice in relation to the issue.

The investigation into the complaint revealed that on August 18, 1975, he sustained a compensable back injury when he slipped from a platform while in the process of washing a car. The complainant was employed as an assembler by an auto manufacturer. A lumbosacral strain superimposed on a pre-accident back condition was diagnosed. Compensation benefits were granted from August 18, 1975 to November 5, 1975, when the complainant returned to work.

The claim was accepted on an aggravation basis, recognizing that on October 31, 1968, the complainant had sustained a compressed L1 vertebrae as a result of a car accident. Surgery in the form of a laminectomy and fusion was performed.

In September of 1972, the complainant had a second car accident. A ruptured disc was eventually diagnosed and on December 13, 1972, the complainant underwent a lumbar laminectomy. He made a satisfactory recovery from this surgery and returned to work a few months later.

The complainant's back appears to have remained stable until his compensable back injury of August 18, 1975. Although he returned to work on November 5, 1975, the complainant contended that his back condition remained symptomatic.

On October 6, 1976, the complainant stopped working again due to back and leg pain which appeared without any further specific accident. Prior to this layoff, the complainant had been assigned to a job which required him to do considerably more bending than his previous duties. A ruptured disc at L5 with nerve root irritation was diagnosed and on August 11, 1977, surgery in the form of a laminectomy at the L4-5 and L5-S1 level was undertaken.

The complainant applied for compensation benefits on the basis that his 1976 layoff and subsequent surgery of 1977 were related to his compensable accident of August 18, 1975. He was denied benefits as the Workers' Compensation Board concluded that the complainant's problems were not related to his compensable injury, but rather to his non-compensable pre-existing back problems.

This issue became the subject of an investigation by this Office into an earlier Appeal Board decision dated July 20, 1977. At various stages in the investigation, this Office submitted to the Workers' Compensation Board information which may have caused the Board to reconsider the complainant's case. The Board declined to reconsider its position and on April 2, 1980, a letter pursuant to section 19(3) of the Ombudsman Act was sent to the Board by the Ombudsman. In that letter, he advised the Board that it was his tentative opinion that the Appeal Board was unreasonable in not fully considering the available information. He accordingly made the tentative recommendation that the Appeal Board revoke its decision and grant entitlement.

In his response dated May 20, 1980, the then Chairman of the Workers' Compensation Board, advised the Ombudsman that the Board would not implement his tentative recommendation. The Board was of the opinion that it had given

sufficient consideration to all the evidence, and could not agree that its decision was unreasonable. The then Chairman also stated that, since in the opinion of the Appeal Board the evidence for and against establishing a relationship was not approximately equal in weight, the policy of Benefit of Doubt did not apply.

After further submission of evidence by this office to the Board and discussion of the matter between the Ombudsman and Board officials, the Board granted the complainant a reconsideration of its previous decision under section 76 of the Workers' Compensation Act. This was outlined in a decision dated May 26, 1981. At that time, the complainant withdrew his original complaint with this office pending the results of the rehearing.

The new evidence which had been submitted to the Board is as follows in its entirety. The reports of:

1. Dr. A., orthopaedic specialist, October 18, 1978:

> In my opinion, his present symptoms are directly related to the accident of August 18th, 1975...
>
> There is no doubt that a man with his history of back problems would have difficulty with job duties that require bending, walking and lifting. However, these movements would aggravate both the pre-existing non-compensable conditions as well as the pre-existing compensable conditions equally. The fact that he had complete recovery following the lumbar laminectomy of 1972 makes it more likely that the job duties aggravated the new development of degenerative disc disease with accompanying right leg pain which began after the accident at work on August 18th, 1975.

2. Dr. B., orthopaedic specialist, June 8, 1979:

> Obviously this is a very difficult question to be dogmatic about, however in my opinion it would appear that if [the complainant]'s symptoms could be attributed to one specific injury, it would appear in my opinion they are most likely related to injury in August of 1975.

3. Dr. A., orthopaedic specialist, October 6, 1980:

> In my opinion, this man's 1976 layoff from work was directly related to the compensable accident of August 1975, which aggravated a pre-existing condition, causing a recurrence of right leg pain.
>
> The injury at work aggravated and made symptomatic a pre-existing but quiescent problem, originally associated with a previous motor vehicle accident.
>
> I am unable to state definitely whether or not the eventual layoff from work had any relationship to the change in work duties one month prior to the layoff in October 1976.
>
> Therefore, the 1976 layoff was directly related to the work associated injury of August 1975, which in turn, aggravated and made symptomatic a

pre-existing but asymptomatic condition (degenerative disc disease of the lumbar spine).

4. Dr. C., orthopaedic specialist, December 1, 1980:

You requested whether this patient's present disability was related to his compensable problem. It is my feeling that it is.

The Board's surgical consultants did not agree that the complainant's layoff of 1976 bore any relationship to his 1975 compensable accident. The Board's position was expressed by Dr. D. in a memo dated November 22, 1978 as follows:

> The basic problem in this claim is one of degenerative disc disease. From a pathological point of view, degenerative disc disease is universal in the human race by the time age 30 is reached. From a clinical point of view it is an extremely common problem, both occurring under compensable circumstances and non-compensable circumstances. Basically it is a product of an individual's heredity, his increasing age, and past stressful incidents, both compensable and non-compensable. Without any question all these causative factors contribute to any degenerative problem being considered for compensation purposes. The distinction that we are forced to make into compensable and non-compensable degenerative disc problems has no existence in nature, it is one that is forced upon us by the fact that we administer the provisions of the Act. In many low back cases being considered as a compensable matter, we have to balance the sequelae of non-compensable incidents against the sequelae of compensable ones in trying to determine whether or not an individual problem can reasonably be accepted as a compensable matter. In a large number of such cases, the decision required is a marginal one and competent people could easily express opposing opinions. In a small number of such cases I cannot regard it as a marginal matter and the case of [the complainant] falls into this smaller group of cases In my opinion the information on this file, the same information as is available to Dr. A., is very markedly in favour of this man's problems subsequent to the 7th of October, 1976 being to a very large extent the sequel of his non-compensable problems. I personally would support the decisions that we have made in this case quite strongly.

The file was also reviewed by Dr. E. of the Board who expressed the following opinion in a memo dated September 18, 1981:

> Subsequently there was no doubt that the patient's spine was very vulnerable and this was demonstrated by his further accident at work. It is interesting to note that his time off work for his compensable accident was indeed relatively short. The spontaneous onset of further pain almost a year later would not be unexpected and despite further surgery, it is to be noted that Dr. B. has demonstrated that the patient continued to have an organic problem in the lower lumbar spine. I would think on the basis of his investigations, the patient would be a candidate for a further spinal fusion.

I have also reviewed the new medical documentation and the transcript.

I do not see any new evidence to reverse the opinion previously expressed by Dr. D.

On July 22, 1981, the complainant appeared before the Commissioners of the Board. Prior to rendering a decision, the panel decided to refer the matter to a Medical Referee, Dr. F., orthopaedic specialist, notwithstanding the opinions of the three independent specialists. Upon receipt of the Medical Referee's report, the Appeal Board deemed the report to be conclusive pursuant to the provisions of section 22(2) of the Workers' Compensation Act and, on this basis, denied the complainant's appeal for benefits subsequent to October 7, 1976. This decision was issued on April 30, 1982. The complainant approached this Office again and requested that we investigate this later decision.

The file was reopened on May 2, 1982 and on May 26, 1982, the Chairman of the Workers' Compensation Board, was notified, in accordance with the Ombudsman Act, of our intention to investigate the complaint which was summarized as follows:

> That the Appeal Board in its decision dated April 30, 1982 was unreasonable to conclude that it had not been established that [the complainant]'s recurrence of back disability on October 7, 1976 was related to his industrial accident of August 18, 1975.
>
> Although [the complainant] has taken note of the opinion rendered by Dr. F., the Board-appointed referee, [the complainant] is of the opinion that the Appeal Board was unreasonable to accept this opinion over the opinions of the other three orthopaedic specialist who had supported his contention.

On June 4, 1982, the Assistant Secretary of the Board responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

The investigation into the complaint took into consideration all the evidence on file relating to the issue of entitlement, including the Medical Referee's report, dated March 10, 1982, which reads as follows, in part:

> ...I think the most probable cause of this patient's current low back and leg disability is the motor vehicle accident described in 1972. The record indicates that this was a significant injury which required hospitalization and an injury at which time the patient began to complain of pain in his low back and right leg radiation. The patient was totally disabled from September 1972 at the time of the accident and eventually required surgical treatment in January 1973. While the patient does have left leg symptoms at the present time it is quite clear from review of the records that the major leg symptoms have been on the right side and that this has been the case from the beginning in 1972.
>
> I think it is reasonable to accept the aggravation of the patient's back problems in 1975, however, on review of the total sequence of events in this patient's back history, I think it is far more likely that the initiating pathology occurred at the time of a vehicle accident in 1972.

During the course of this Office's investigation, the Ombudsman reached the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that "it was unreasonable for the Appeal Board not to have directed otherwise than that the Medical Referee's report was conclusive and thereby to have denied the complainant entitlement to benefits on this basis alone, notwithstanding the other evidence before it."

The Ombudsman advised the Chairman of the Board and the accident employer of his possible conclusion and recommendation in a letter dated April 21, 1983. The Ombudsman pointed out:

> As you are aware, the findings of a Medical Referee carry significant weight in the Board's decision-making process. It is therefore very important that if the report is to be deemed conclusive it must be clear in respect to the issues certified.
>
> The Board, recognizing the significance of clarity in Medical Referee's reports, developed the following directives:
>
> > (b) The order of reference is to set out the specific matters on which the Medical Referee's opinion is required such as: the employee's condition at the time of the examination, the diagnosis, the causal relationship of the employee's condition to the reported accident or industrial disease, and in non-fatal claims, whether the employee is fit for employment, and where fit, the work limitations, if any.
> >
> > . . . .
> >
> > (e) The employee is to be advised that the Medical Referee's opinion as to the matters certified is to be conclusive and to be the basis of the Board's adjudication.
>
> In its letter to Dr. F., the Board advised him that the issue before the Panel was entitlement to benefits for a recurrence of [the complainant]'s back problem on October 7, 1976 as it related to his accident in 1975. No specific questions were directed to Dr. F. Since the proper questions to be addressed were not supplied to the Referee, it is understandable that the report might have failed to clearly address the issues.
>
> Having received and reviewed the Referee's reply, I would not agree with the Appeal Board's decision that the report is conclusive as to the issue at hand. It appears to me that Dr. F. does not specifically address the cause of the 1976 back disability and subsequent layoff.
>
> In his response dated March 10, 1982, Dr. F. indicated that the probable cause of the current problem, presumably the 1982 problem, was the 1972 motor vehicle accident. He also advised the Board that the initiating pathology was the 1972 accident.
>
> In my opinion the necessary clarity concerning the probable cause of the 1976 layoff is missing and therefore it was unreasonable for the Board to have directed that the report be considered conclusive.

On the other hand, the other reports available specifically relate the 1976 layoff to the 1975 work incident.

The Ombudsman tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, "that the Appeal Board revoke its decision of April 30, 1982, in which it concluded that the Medical Referee's report was conclusive and grant entitlement on the basis of all the evidence before it."

In a letter dated May 12, 1983, the Ombudsman received submissions to his section 19(3) letter from the accident employer. The following comments, in part, were offered with reference to the Ombudsman's tentative conclusion and recommendation:

> In our opinion it would seem to be a very drastic and extreme measure to recommend a complete reversal of a decision based on a lack of clarity by the Medical Referee. Rather, it would seem more appropriate to either suggest that Dr. F.'s statement be explained or that another medical examination be conducted, with specific instructions provided, to avoid this type of confusion.

The Chairman responded in a letter dated May 16, 1983. He indicated in his response that the Appeal Board did not agree that Dr. F.'s report "failed to clearly address the issues". He went on to comment that the panel was satisfied that Dr. F. understood the issue to be a claim "for further entitlement for a recurrence of his low back problem of October 7, 1976", as related to the industrial accident of August 18, 1975.

The Chairman's letter went on to state the following:

> In his report of March 10, 1981, Dr. F. clearly, in the panel's view, addresses his issue when he states:
>
> > I think the most probable cause of his patient's current low back and leg disability is the motor vehicle accident described in 1972.
>
> The panel might agree that the use of the word "current" might have obscured the issue, had Dr. F. not gone on to say:
>
> > While the patient does have left leg symptoms at the present time it is quite clear from review of the records that the major leg symptoms have been on the right side and that this has been the case from the beginning in 1972.
>
> In other words, the panel was satisfied that the condition found by Dr. F. in 1982 and referred to as "current", was essentially no different from that which disabled [the complainant] in October of 1976. In the panel's view, the conclusiveness of Dr. F.'s report was further enhanced by this concluding comment:
>
> > I think it is far more likely that the initiating pathology occurred at the time of a vehicle accident in 1972.
>
> While appreciating that for the Ombudsman the report may not have been conclusive, the Appeal Board cannot agree that, for its own purposes,

the report was not conclusive. Accordingly the panel disagrees with your tentative views.

Turning now to your tentative recommendation, the Appeal Board is concerned that, even if your tentative conclusion were accepted, your tentative recommendation would not be an appropriate remedy....

All of the foregoing notwithstanding, the Appeal Board has significant concern relative to the manner in which the appeal proceeded after the hearing. The panel notes that both [the complainant], his representative and the employer were initially told that they would be given an opportunity to review Dr. F.'s report and to make submissions thereon. This offer was subsequently withdrawn on the grounds that submissions would not be appropriate as the report was conclusive.

The panel agrees in retrospect that it would have been appropriate to receive submissions on the report and on the issue of its conclusiveness, before having deemed it conclusive and rendering a decision. Accordingly, it is the Appeal Board's intention to offer [the complainant] and his representative, as well as the employer, an opportunity to make submissions either in person or in writing, with respect to Dr. F.'s report. Should these further submissions demonstrate to the panel satisfaction [sic], deficiencies in Dr. F.'s report sufficient to render it inconclusive, the panel will have the option of either requesting a clarifying opinion from Dr. F., appointing a new Medical Referee, or any other action it considers appropriate under these circumstances.

The Appeal Board would appreciate knowing whether the contemplated action will serve to resolve [the complainant]'s complaint to your office, before proceeding further.

In response to the Chairman's proposal, the Ombudsman replied with the following in a letter dated July 7, 1983:

Your proposed course of action as outlined in the second-last paragraph of your letter, would not, in my opinion, necessarily resolve [the complainant]'s complaint with my Office.

However, I am prepared to await your implementation and final results of these actions before reaching a conclusion on whether you have addressed the possible conclusion and possible recommendation as outlined in my letter of April 21, 1983 pursuant to section 19(3) of the Ombudsman Act.

I will await your further communication.

On November 10, 1983, this Office received an Appeal Board decision dated November 2, 1983, which indicated the following:

The Appeal Board has now had an opportunity to review the submissions filed by [the complainant's representative] on August 18, 1983 and the submissions filed by [the complainant's M.P.P.] and received by the Board on October 27, 1983, on behalf of [the complainant] and the submissions of [the employer's representative] dated August 26, 1983, filed on behalf of [the accident employer].

> The Appeal Board concludes that these submissions would not cause the Appeal Board to vary, amend or revoke its decision of April 30, 1982, or to grant a new hearing.

After receipt of the above decision, our investigation into the April 30, 1982 decision continued. The submissions of the employer's and employee's representatives and the complainant's M.P.P. were reviewed as information related to the issue under investigation.

The employee's representative stated the following in a letter dated August 18, 1983:

> For the Board to accept Dr. F.'s report and opinion and deny the claim and to disregard a number of well-known and respected specialists' opinions and reports, leads one to question the fairness of the medical evidence submitted being taken into consideration. I personally believe that [the complainant] has followed every directive by the Board and he has medical evidence showing a direct relationship to his industrial accident of 1975.
>
> If there is any benefit of the doubt, we respectfully request that [the complainant]'s claim be allowed.

The submission by the complainant's M.P.P., a copy of which was received at my Office on October 26, 1983, stated the following:

> The Board's decision must be based on a review of all medical evidence in the file. Before they appointed a Referee, the evidence overwhelmingly supported [the complainant]'s claim, and even with Dr. F.'s report, the medical evidence on file still favours him on balance. Even Dr. F.'s conclusion leaves room for doubt since he is able to say only that "the most probable cause" of symptoms was the car accident, and that is "far more likely" to be the cause than the work injury. This is hardly conclusive, and in view of the numerous dissenting opinions from other specialists, the benefit of any doubt should be in [the complainant]'s favour.
>
> I hope that this decision will be reversed and the claim for compensation recognized on this basis.

The submission of the accident employer dated August 26, 1983, stated the following:

> In summation, it is the position of the company that the Workers' Compensation Board has thoroughly reviewed all aspects of the case and has followed the proper procedure in seeking the opinion of a Medical Referee. This procedure should not be completely overturned but the necessary clarification should be obtained.

The Temporary Ombudsman reviewed this case in light of our investigation and the representations of the Board and the accident employer.

It appeared to the Temporary Ombudsman that the Board's response of May 16, 1983 to the Ombudsman's recommendation pursuant to section 19(3) of the Ombudsman Act and its subsequent action which resulted in the Appeal Board

decision of November 2, 1983 did not effectively deal with the possible conclusion and recommendation as set out in the Ombudsman's letter of April 21, 1983, nor did it resolve the question of clarity insofar as the Medical Referee's report was concerned.

In its response, the Board indicated that while the Medical Referee's report might not have been conclusive for the Ombudsman, the Appeal Board could not agree that for its own purposes, the report was not conclusive. In the Temporary Ombudsman's view, clarity in the Medical Referee's report is necessary for both his purposes and those of the Workers' Compensation Board. Certainly, the Board must agree that both this Office and itself share the same purpose: that of just compensation for injured workers. The Temporary Ombudsman was therefore of the opinion that because the Medical Referee's report had such significance in this case, especially when considered in conjunction with the other clearly supportive reports, that the Referee's report was not sufficiently clear to have been deemed conclusive by the Board.

Taking an overall review of the complainant's history with the Board and this Office, a sequence of events which has now unfortunately gone on for several years, it appeared to the Temporary Ombudsman that the guiding factor applied in all this Office's investigations - that of judging the validity of the complaint on the basis of all evidence - must apply in this complaint.

Therefore, it was the Temporary Ombudsman's opinion that the possible conclusion and possible recommendation as outlined in the Ombudsman's letter of April 21, 1983 were still valid as, in his view, the Board's actions and reasons did not presented him with a significant refutation of the arguments already outlined.

It therefore appeared open to the Temporary Ombudsman to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable for the Appeal Board not to have directed otherwise than that the Medical Referee's report was conclusive and thereby to have denied the complainant entitlement to benefits on this basis alone, notwithstanding the other evidence before it.

The Temporary Ombudsman was also of the opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Board's continued refusal to deny the complainant's claim had been unjust given the preponderance of evidence which supported the relationship.

The Temporary Ombudsman recommended, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant entitlement to compensation benefits on the basis of all the evidence before it.

This recommendation was included in a report to the Chairman dated February 10, 1984.

The Board had not responded to the report and recommendation by March 30, 1984. The Ombudsman therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 17

The complainant wrote to this Office on March 14, 1982, with a complaint against a decision of the Appeal Board of the Workers' Compensation Board dated February 9, 1982. The complainant contended that the Appeal Board was unreasonable to deny further entitlement for a left wrist disability as being causally related to her industrial accident of April 14, 1967. The complainant further contended that the carpal tunnel syndrome of her left wrist, diagnosed on July 11, 1969, resulted directly from her accident of 1967 and, consequently, so too did the subsequent complications in 1978. The Appeal Board concluded that, "a relationship between the complainant's further disability, diagnosed as left wrist carpal tunnel syndrome and exostosis of second and third metacarpals of the left hand are not causally related to the industrial accident of April 14, 1967, nor are they causally related to the work as performed by the complainant."

On April 27, 1982, the Chairman of the Workers' Compensation Board, was notified in accordance with the requirements of the Ombudsman Act of our intention to investigate the complaint. He was invited to make a statement of the Board's position on the complainant's claim.

On May 6, 1982, the Vice-Chairman of Appeals responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of our investigative staff, who thoroughly reviewed the complainant's Workers' Compensation Board claim file, discussed the complaint with the complainant, and considered the relevant legislation and Board policy and practice in relation to the issue.

Our investigation revealed that on April 14, 1967, the complainant tripped while going up a flight of stairs and her left hand caught on the edge of the step, forcing her hand to go backwards, and causing a painful left wrist. The accident happened while the complainant was at work, and she reported it to her employer. Her wrist was bandaged by the first aid attendant; there was no lost time or further medical attention. After the initial swelling went down, the complainant noted a lump on her wrist, later diagnosed as a ganglion. The complainant continued to work, with occasional complaints of pain to a co-worker.

On July 4, 1969, the complainant was examined by her family physician, Dr. A., with complaints of pain in the left wrist, radiating down to the fingers. An orthopaedic specialist, Dr. B., diagnosed carpal tunnel syndrome of the left wrist, and surgery for a decompression was carried out on August 11, 1969. At the same time, a ganglion was noted. After a three-week period of recuperation, the complainant returned to her job.

On June 29, 1978, the complainant had the ganglion removed from her left wrist. The Board accepted the surgery as being medically related to the complainant's accident of April 14, 1967. Compensation benefits were paid from June 29, 1978 to July 20, 1978. The complainant continued to experience pain after the removal of the ganglion. Her condition was diagnosed as carpal tunnel syndrome and exostosis. The complainant has not returned to work since June, 1979, and only worked for short periods of time between July 1978 and June 1979.

Prior to rendering a final decision, the Board referred the complainant to Dr. C., a noted specialist, who, in turn, referred her to Dr. D..

In its decision of February 9, 1982, the Appeal Board concluded that the complainant's disability, diagnosed as left wrist carpal tunnel syndrome and exostosis of second and third metacarpals of the left hand, was not causally related to the industrial accident of April 14, 1967, nor was it causally related to the work performed by the complainant.

During the course of our investigation into this complaint, it became apparent to this Office that to properly consider this complaint, it was necessary to separately evaluate and consider the following two questions:

1. Was [the complainant]'s surgery of August 11, 1969 for decompression of carpal tunnel syndrome related to her falling accident of April 14, 1967?

2. Was her ongoing disability diagnosed as carpal tunnel syndrome and exostosis resulting in lost time from work subsequent to July 20, 1978 related to the fall of April 14, 1967 and subsequent 1969 surgery?

In the early phase of the investigation, this Office had corresponded with the Board and requested an expansion and clarification of the Appeal Board's reasons why the supportive opinions of two specialists, Dr. D. and Dr. B., as well as the opinion of the complainant's family physician, Dr. A., had not been accepted as evidence by which the claim could have been allowed, and why the policy of benefit of doubt was not applied.

The Assistant Secretary of the Board, responded in a letter dated December 2, 1982, stating the following:

> The panel did not accept the medical opinions of Dr. B. and Dr. A., since both reports contained factual inaccuracies. Should your investigation contradict the finding of factual inaccuracies, I would be pleased to refer the matter back to the panel for its further consideration.
>
> The panel did not accept Dr. D.'s opinion for the reasons set forth in Dr. E.'s memorandum of March 31, 1981.
>
> The policy of benefit of doubt was not applied since, in the panel's opinion, the weight of evidence for and against was not approximately equal in weight.

Correspondence was entered into by this Office with Dr. B. and Dr. A.. Both doctors were asked to review their opinions regarding the complainant's case, keeping in mind the correct set of facts. In their earlier reports, both physicians had referred to dates of treatment incorrectly, i.e., June 1969 instead of August 1969. The responses of these physicians, who continued to support the complaint, were submitted to the Board.

The Board's response to these submissions was received in a letter dated April 18, 1983, which stated the following, in part:

The panel notes that Dr. B.'s report of January 26, 1983 is in error, in that he suggests that [the complainant]'s surgery in August of 1969 was compensable. This surgery, for a carpal tunnel syndrome, was not compensable.

The panel also notes that Dr. A.'s argument goes to the question of the relationship between the ganglion and the compensable events. As you know, the Board has accepted that [the complainant] has entitlement for the ganglion and its removal. Dr. A. appears to be of the view that [the complainant]'s continuing problems are due to the surgery in August of 1969, by Dr. B.. Dr. B., on the other had, feels that the continuing problems are due to the surgery by Dr. A. in June of 1978.

Neither doctor appears to be acquainted with the fact situation as accepted by the Appeal Board, and as recorded in memo 3. In fact, Dr. A. concedes that "it is quite possible that [the complainant]'s testimony to me hasn't been accurate".

Under the circumstances, the Appeal Board did not feel that the recent information from Drs. B. and A. would give it cause to change its views of this case.

Having deliberated on the two questions under investigation, and after reviewing all information on file and correspondence received from the Board, the Temporary Ombudsman reached two possible conclusions, pursuant to section 22(1)(b) of the Ombudsman Act. In the first possible conclusion, he indicated that "the Appeal Board was unreasonable to conclude that the complainant's surgery for carpal tunnel decompression carried out on August 11, 1969 was not related to her compensable injury of April 14, 1967."

In his second possible conclusion, the Temporary Ombudsman concluded that "the Appeal Board was unreasonable to conclude that the continuing problems subsequent to July, 1978, diagnosed as left wrist carpal tunnel syndrome were not causally related to the industrial accident of April 14, 1967."

The Chairman of the Board and the accident employer were advised of the possible conclusions and recommendations in a letter dated November 15, 1983.

In support of the first possible conclusion, the Temporary Ombudsman cited the following evidence:

1. The opinion of Dr. D., Specialist in Physical and Rehabilitative Medicine, as outlined in his report of October 20, 1980:

> I think the problems of the back of her wrist and the problems of the front of her wrist are clearly compensable, related to the same accident incident.

2. The report of Dr. B. dated September 29, 1981:

> In my opinion a fall resulting in a sudden hyperextension injury to the wrist in 1967 could have caused a carpal tunnel type of syndrome which was relieved by surgery in 1969. I think that she should have some compensation because of her injury in 1967, until at least three weeks after the surgery was done in June 1969 [sic]. [This should read August 1969.]

3. The report of Dr. B. dated January 26, 1983:

> In my opinion this disability, regarding the initial injury in 1967, resulted in an eventual carpal syndrome which was treated successfully in August 1969. This was a compensation injury, in my opinion, for a few weeks after the time of surgery and she sufficiently recovered to return to work.

4. Dr. A., [the complainant]'s family physician, indicated the following in his report dated February 28, 1983:

> It seems to me that the patient did suffer from an injury to the wrist, a wrist which became subsequently the site of a ganglion, which was surgically excised, and also of a nerve entrapment syndrome, which was apparently treated surgically by Dr. B. in August of 1969, ...
>
> In conclusion, [the complainant] suffered from an injury to the wrist, which produced a carpal tunnel syndrome.

The Temporary Ombudsman tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, "that the Appeal Board revoke its decision of February 9, 1982 and award the complainant entitlement for the 1969 surgery to correct the carpal tunnel syndrome as being related to and caused by her compensable accident of 1967."

With reference to the second possible conclusion, the Temporary Ombudsman indicated:

> ... my investigation has placed particular emphasis on the opinion of Dr. D. As a specialist in this field of medicine, Dr. D. rendered his opinion, as quoted earlier in this report, having had the benefit of examining [the complainant] and conducting appropriate testing.

The Temporary Ombudsman went on to state:

> Further, I have noted the opinion of Dr. A., [the complainant]'s family physician, as outlined in his report of November 23, 1981:
>
> > ... her current complaints, which I believe to be due to a compression of the ulnar nerve at the wrist and it is precisely this occurrence, that in my view, cannot possibly be separated from her accident of April 1967. I believe she should be given the benefit of the doubt.
>
> In a further report, dated February 28, 1983, Dr. A. reiterated:
>
> > In regards to the nerve entrapment syndrome, following surgery for carpal tunnel syndrome, which was the consequence of her working accident, I stand by my previously expressed opinion, that this is the result of her surgery to the wrist for release of carpal tunnel.

During the course of the investigation, we also took note of the dissenting opinions rendered by Dr. E. and Dr. F. of the Board. It was also noted

that these doctors never examined the complainant. The fact that Dr. B. was of the opinion that the complainant's problems subsequent to 1978 were related to the surgery which was done on June 29, 1978 by Dr. A. was also considered.

Dr. E. stated the following in a memo dated November 5, 1980, after review of Dr. D.'s report:

> I am not in agreement with Dr. D.'s opinion as to the relation of the carpal tunnel syndrome and the compensable incident.
>
> We do not have Dr. C.'s opinion which is what we really want....

Dr. C., to whom the complainant had been sent by the Board, did not directly address himself to the question of a relationship, suggesting instead that the Board do this.

In a further memo dated March 31, 1981, Dr. E. stated:

> I have reviewed this file again. This lady had an injury when she fell going up stairs on the 14th of April 1967. We have a diagnosis of carpal tunnel syndrome some 2 years and 3 months later with a one month history. There was also thought to be what might well have been a ganglion at that time and she was subjected to an operation.
>
> Neither the carpal tunnel syndrome nor the ganglion were in any way related to the fall. It is my view that they would have surfaced long before two years and two months after the incident. The possibility of the ganglion having been there for some time must be considered and indeed in the patient's history as given to Dr. G. the lump appeared rather indefinitely and presumably antidated [sic] the development of the carpal tunnel syndrome. It is for this reason that we considered this a benefit of doubt type of situation which we could not resolve and recommended acceptance of it. Having accepted the ganglion we now find that it disappeared at about the time of the surgery and this is quite in keeping with what happens because of course tourniquets are put on and the application of a tourniquet to a region containing a ganglion can be sufficiently forceful to squash it and have it disappear only probably to reappear again and this would appear to me what has been done and there was a subsequent removal of this ganglion. This would presumably be accepted if we had already accepted the fact of the ganglion. It would have no bearing on the acceptance or rejection of the carpal tunnel problem.
>
> Now she has a continuing carpal tunnel problem and presumably there has been some fibrosis in the region of previous surgery. This would not appear to be any more of a compensable problem now than it was previously. She also has a small insignificant exostosis and this is not a ganglion and has no relevance and is not part of the compensable disorder. I would suggest therefore that the third of your alternatives is the most acceptable professionally.

Dr. E. was responding to a request for his opinion from an Appeals Adjudicator, to whom the matter had been referred upon appeal by the complainant. Dr. E.'s last sentence refers to the Adjudicator's suggested three ways of dealing with the issue of entitlement. These were:

1. Accept the original carpel [sic] tunnel syndrome and surgery in 1969 as being related to the accident, noting the confirmation of continuing complaints for 2 years by a co-worker, and continuing entitlement.

2. Confirm the denial of entitlement for the original carpel [sic] tunnel syndrome and allow the current problems if these can reasonably be related to the surgery for ganglion for which entitlement was granted in 1978, noting the continuing complaints since that surgery was performed.

3. Deny entitlement completely for the carpel [sic] tunnel syndrome & allow only for the ganglion, if such can be justified.

Dr. F. reviewed the claim upon request of the Appeal Board and stated the following, in part, in a memo dated December 8, 1981:

> The central issue in this situation still seems to remain the question of whether or not the carpal tunnel decompression effected in August of 1969 by Dr. B. should have been considered a compensable matter in relation to the incident of the 10th of April 1967. When one reviews the investigation notes, there is continuity from one co-worker but no continuity otherwise. The period of time is one of 2 years and 3 months and like my predecessor I find it difficult to believe that a presumption of relationship is justified.

The accident employer did not respond to the Temporary Ombudsman's tentative conclusions and recommendations. However, the Chairman of the Board responded on November 28, 1983, and stated the following in his letter:

> As you know, correspondence was exchanged between your Office and the Board, concerning the reasons why the Board did not accept the medical opinions on which you have based your tentative conclusions. In the panel's view, the Board's letters of December 2, 1982 and April 18, 1983 adequately explain its position in respect of this evidence. The Appeal Board points out, that the reasons given for not accepting this evidence went beyond the issue of the delay in the onset of symptoms, on which you comment on page 4 of your report.
>
> With specific regard for your second tentative conclusion, the Appeal Board agrees there are more medical opinions supporting a relationship than opinions against. However, the Appeal Board prefers to weigh the evidence before it on the basis of quality, rather than quantity and thus considered the evidence of Drs. E. and F. to have greater weight than the collective evidence of Drs. B., A. and D..
>
> Under the circumstances, the Appeal Board does not intend to implement your tentative recommendation.

The Chairman's response to the tentative conclusions and recommendations was considered and renewed attention was given to the Board's concerns about the factual inaccuracies in the medical reports as outlined in its letters of December 2, 1982 and April 18, 1983.

As a general comment, we were satisfied that Doctors B. and A. were clearly aware of the fact situation and had an understanding of the issues at hand when rendering their respective opinions. These physicians reiterated their opinions keeping the accuracy of the facts in mind as indicated earlier in this report and, for this reason, the Temporary Ombudsman was not persuaded by the Board's position in this respect.

With reference to the Board accepting the opinion of Dr. E. over that of Dr. D., it was the Temporary Ombudsman's view that this was unreasonable for two reasons. Firstly, Dr. E. is not a specialist in this field of medicine and secondly, he rendered his opinion without the benefit of either treating or examining the complainant. On the other hand, Dr. D. is a specialist in this area of medicine and rendered his opinion after examination of the complainant on more than one occasion and after carrying out extensive testing of her condition before documenting his comments. It is also of significance that when the Board sought an outside opinion from Dr. C., he, presumably recognizing Dr. D.'s greater expertise in this field of medicine, decided to refer the complainant to Dr. D..

The Board's statement as outlined in the letter of December 2, 1982 that the weight of evidence for and against was not approximately equal, is correct. Indeed, it would appear that the greater weight of the evidence supports the complainant's claim.

Giving attention to the Board's letter of April 18, 1983, it would appear that although Dr. B. in his report of January 26, 1983 was not clear on the issue of whether or not the complainant actually received compensation benefits in 1969, what is important is the fact that he states clearly in the last paragraph of that report that the carpal tunnel surgery in 1969 resulted from the 1967 injury and was, therefore, compensable.

In its letter of April 18, 1983, the Board notes that Dr. A. and Dr. B. disagree on the cause of the complainant's problems subsequent to 1978. Dr. A. attributes the problems to the surgery of 1969, while Dr. B. feels that the continuing problems are due to the surgery in June of 1978.

The Temporary Ombudsman stated that, while he was aware of this difference of opinions, it appeared to him that both these arguments led to the same conclusion - that the complainant's claim was compensable - albeit from different points of view. This difference in medical opinions cannot, he noted, be used to discredit the complainant's claim for compensation.

As a final comment, the Chairman's statement wherein he indicated the following was noted:

> The Appeal Board agrees there are more medical opinions supporting a relationship than opinions against. However, the appeal Board prefers to weigh the evidence before it on the basis of quality, rather than quantity and thus considered the evidence of Drs. E. and F. to have greater weight than the collective evidence of Drs. B., A. and D.

With great respect for the opinions of the Board's doctors, the Temporary Ombudsman stated that he could not agree with the Appeal Board's decision to favour the evidence of the Board's doctors in this case over that of the independent treating physicians. All the independent physicians quoted, Dr. B., Dr. A. and Dr. D., have first-hand knowledge of the complainant's case as

they have treated her. Dr. D. is a specialist, as is Dr. B. Dr. A. has been the complainant's family physician for a number of years. Dr. E. and Dr. F. do not have specializations in this field of medicine nor have they ever examined the complainant. Given this set of facts, the Temporary Ombudsman indicated that he was bound to conclude that both the quantity as well as the quality of the evidence from the independent physicians is superior and therefore, the Appeal Board, in his opinion, should have accepted this information and granted entitlement to the complainant.

Accordingly, it was his opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, in its decision of February 9, 1982, was unreasonable to deny the complainant entitlement for the 1969 surgery to correct a carpal tunnel syndrome as being related to and caused by her compensable accident of 1967. The Board was further unreasonable to deny the complainant entitlement for her disability subsequent to 1978 diagnosed as carpal tunnel syndrome as being related to her compensable accident of April 14, 1967.

He therefore recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of February 9, 1982 and acknowledge entitlement for the above disabilities as being related to the complainant's compensable injury of April 14, 1967.

This recommendation was included in a report to the Chairman dated February 15, 1984.

The Board had not responded to the report and recommendation by March 30, 1984. The Ombudsman therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 18

The complainant registered his complaint against the Workers' Compensation Board with this Office on June 17, 1981. The complainant contended that the Appeal Board, in its decision dated June 4, 1981, was unreasonable in denying him entitlement to temporary total disability benefits from May 5, 1980 to June 5, 1980, and further, that the Appeal Board was unreasonable in calculating his temporary benefits on the basis of earnings prior to his original accident in 1969.

On July 8, 1981, the Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was also asked whether he wished to make a statement of the Board's position in relation to the complaint. On behalf of the Chairman, a reply was received from the Vice-Chairman of Appeals, advising that since the complaint filed with the Ombudsman and the issue decided upon by the Appeal Board appeared to be the same, the Board did not wish to make a statement at that time.

Our file on this complaint was then assigned to two members of our investigative staff. During the investigation, our investigators conducted a thorough review of the complainant's Workers' Compensation Board claim file. In addition, they obtained further information from the complainant, and contacted prospective employers named by the complainant to the Appeal Board, as well as the medical clinic which the complainant attended during the time in question. The relevant legislation, policy and practices of the Workers' Compensation Board in relation to this issue were also carefully considered.

As a result of the investigation of this complaint, the Temporary Ombudsman concluded that he was unable to support the complainant's claim that he should have received entitlement for benefits between May 2, 1981 and June 4, 1981. The complainant, as well as the Workers' Compensation Board, was advised of this under separate cover. This report therefore concerns the complainant's contention that his temporary benefits, which commenced June 5, 1981, should have been calculated on the basis of his earnings in the months prior to the recurrence, rather than on the basis of earnings prior to his accident in 1969.

The investigation carried out by our Office indicates that on November 5, 1969, the complainant, then a ranger/labourer, fell 50 feet, fracturing his right heel and incurring compression fractures of the lumbar spine. Initial treatment was conservative and included rest and rehabilitation. The complainant eventually returned to work in 1971 as a stockman for a railway company. However, due to deterioration in his right foot condition, he was forced to leave work and undergo surgery in December 1972. Upon recovery, he again returned to work as a truck driver until 1975, when increasing discomfort in the right foot necessitated additional surgery consisting of a refusion of the calcaneocuboid joint. The complainant again returned to work once he recovered from the effects of the surgery. Unfortunately, his back disability increasingly troubled him, until in 1977 he was forced to undergo back surgery consisting of disc excision and spinal fusion. As anticipated by the surgeon who performed this operation, the complainant took quite a long time to recover. The complainant was assessed several times by the Pensions Branch and by 1979 he was in receipt of a 28% permanent disability award.

In January 1980, the complainant commenced work as a welder; however, during the spring of that year, he reports that he experienced increasing back discomfort. The complainant was notified by his employer that he, along with several other co-workers, would be laid off on May 5, 1980 due to lack of work. On May 2, 1980, the complainant states that his back pain became so severe that he was unable to finish his shift. He therefore decided to lay off early due to back pain and was unable to return to work again prior to the pre-arranged layoff. According to the complainant's evidence, he initially attempted to treat his back condition with rest and analgesics. As his back did not improve after several weeks, the complainant went to see his doctor on June 5, 1980.

From June 5, 1980 onward, the complainant continued to see his family physician frequently and in addition was examined and treated by Dr. A., an orthopaedic surgeon. This course of treatment continued into 1981 and the Board was notified that the complainant was suffering from chronic back pain.

The Workers' Compensation Board accepted the complainant's condition as a recurrence of his original back disability. The Board further deemed the recurrence to have commenced as of the first visit to the doctor on June 5, 1980. Payment of temporary total disability benefits to the complainant therefore

commenced as of June 5, 1980. In order to arrive at the complainant's rate of temporary benefits, the Board applied section 40 of the Workers' Compensation Act, which reads as follows:

> Where an employee, who has become entitled to benefits under this Act and has returned to employment, becomes entitled to payment for temporary disability by reason of any matter arising out of the original accident, the compensation payable for such temporary disability shall be paid on either the average weekly earnings at the date of the accident or the average weekly earnings at the date of recurrence of the disability, calculated in the manner set out in section 39, whichever is the greater.

On October 3, 1980, the Claims Review Branch decided that the complainant's benefits would be calculated on the basis of his income prior to his 1969 accident, as he could not show that he had any earnings during the four weeks prior to June 5, 1980.

On June 4, 1981, the Appeal Board concluded that it was "unable to deviate from the Board's policies and procedures regarding the calculation of compensation as outlined in Section 40 of the Workmen's Compensation Act."

As a result, the complainant received benefits of $99.60 per week, which amount included the escalation provided for in section 42 of the Workers' Compensation Act. It should be noted that during April 1980, the complainant was earning approximately $398. per week on average. Had the complainant's earnings during the period prior to May 2, 1980 been used as an earnings basis in calculation of his benefits, his temporary benefits would have been considerably higher.

It was noted that section 40 of the Act requires that compensation be calculated on the basis of "average weekly earnings" at the date of the recurrence or the accident. Further, section 45 of the Act requires that "average weekly earnings" be calculated in a manner which will best reflect the true rate of remuneration:

> 45(1) Average earnings shall be computed in such a manner as is best calculated to give the rate per week or month at which the employee was remunerated but not so as in any case to exceed the rate of $25,500 per annum.

The Board has approved policy directives pursuant to section 45 which read in part as follows:

> Directive 2 (1) The present general practice of computing the average weekly earnings during the four weeks prior to the date of accident is to be continued in determining the earnings basis for temporary disability payments as this method has proven to be the manner best calculated to give the rate per week or month at which the employee has [sic] remunerated as per Section 44(1), subject to the other subsections in Section 44.

. . . .

> (3) On the request of the employee or the employer that it would be more realistic to use the earnings for the twelve months prior to the accident for the temporary disability basis, discretion will be used and where is [sic] is proper, such earnings will be taken to adjust the basis for temporary disability.

Usually, upon recurrence of a disability, the Board establishes the earnings base of the injured worker on the basis of income during the four weeks immediately prior to the recurrence. This practice is based on the policy formulated pursuant to section 45. It is also evidenced in the Claims Adjudication Branch Procedures Manual in the section concerning computing, which states that in order to determine the earnings basis, an Adjudicator must find out the gross earnings during the four weeks prior to the date of the recurrence. Generally, the policy of calculating benefits on the basis of earnings in the four weeks immediately prior to the recurrence works in favour of the claimant as the most recent earnings are the highest. However, in the case of the complainant, the strict application of this part of the policy resulted in what appears to be an inequity.

The Ombudsman noted also that the Board has the discretion under its policies approved under section 45 to calculate average weekly earnings in the case of an accident on the basis of income during the twelve months prior to the layoff. While this policy refers to earnings prior to an accident, in our view it would be an inconsistent application of the Act to arrive at average earnings prior to a recurrence on a different basis from that used for average earnings prior to an accident.

During the course of our investigation, the Temporary Ombudsman formed the tentative view that:

> ... pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board's decision to use average weekly earnings as of the date of the accident as an earnings basis was unreasonable.

In a letter dated August 30, 1983, written pursuant to section 19(3) of the Ombudsman Act, the Temporary Ombudsman advised the Chairman and the accident employer, the Ministry of Natural Resources, of the possible conclusion and the consequent possible recommendation. In support of the possible conclusion and recommendation, he pointed out that:

> In support of this conclusion, I wish to point out that according to section 40 the intent of the legislation is to compensate in accordance with the greater earnings basis. [The complainant] had been working during five of the six months prior to the recurrence of his disability. Average weekly earnings could easily have been arrived at through calculations on the basis of a period greater than the four weeks immediately prior to the recurrence of the disability. In view of section 45 which requires that average weekly earnings be calculated in a manner to accurately reflect earnings, the restriction of such a calculation to four weeks is not required by the statute and in this case works an inequitable result. The refusal to calculate an earnings basis on 1980 income has resulted in [the complainant] receiving benefits based on 11 year old earnings with extremely low benefits. This manner of arriving at the quantum of [the complainant]'s benefits appears therefore to conflict with the intent of the Act as reflected by section 40.

The letter of August 30, 1983, went on to state that:

> It would appear that it might be open to me to recommend, pursuant to section 22(3)(c) of the Ombudsman Act that the Appeal Board vary its decision and calculate the temporary total benefits on the basis of [the complainant]'s earnings during a period greater than four weeks which would fairly represent his earnings prior to the recurrence of the disability.

The Chairman responded to this letter on October 20, 1983. In this letter, he stated that he was not in agreement with the tentative conclusion and tentative recommendation. In justification of the Board's position, he pointed out that policy directives pursuant to section 40 of the Workers' Compensation Act provide as follows:

> "If there are no earnings at the time of the most recent recurrence, payment shall be based on the earnings at the time of the original accident adjusted in accordance with the provisions of (then) Section 41 (a) (1) and Section 44 (1)."

The Chairman indicated that while the Board recognized that relying on pre-accident earnings to calculate post-recurrence benefits might result in inequity, sections 42 and 45 provided some relief against unfairness. According to the Chairman, in the case of the complainant, the application of the relieving sections resulted in an increase from benefits which would have been at a rate of $67.23 per week to benefits at a rate of $99.00 per week. Finally, according to the Chairman's letter, it is the position of the Board that the wording of section 40 will not allow the calculation of benefits on the basis of earnings prior to the recurrence if the injured worker had no income at the date of the recurrence.

In considering the Chairman's response, the Ombudsman noted that the policy which he cites would appear to contradict the Claims Adjudication Procedures Manual pertaining to section 40, which is as follows:

> 1. To consider the application of Section 40 the Claims Adjudicator obtains the following earnings information:
>
> - the gross earnings for four weeks prior to the date of accident AND prior to the date of layoff or
>
> - where the period prior to the date of layoff is less than four weeks, the gross earnings from the date of the most recent employment up to but not including the date of layoff.

In addition, he noted that the Claims Review Branch, in arriving at a decision with respect to this matter, stated that in the event of a recurrence: "... a new (earnings) basis may be established using the earnings in the four weeks prior to the date of the layoff or medical attention. In your case, in the four weeks prior to June 5, 1980, there were no earnings due to your lost time from work due to lack of work."

It is clear, therefore, that the Claims Review Branch, in arriving at a decision, addressed its mind to the question of earnings during the entire four week period prior to the recurrence and not simply to whether or not there were

actual earnings at the date of the recurrence. Unfortunately, the Appeal Board decision is particularly unhelpful with respect to this issue as it only confirms the prior decisions as having been made properly.

In the Ombudsman's view, this contradiction between the Board's practice and its policy arises out of a rigid interpretation of section 40 which is not in keeping with the intent of the legislation, particularly as this is evidenced by section 45. Section 40 requires not that there be actual earnings at the date of the recurrence, but rather that there be "average earnings". In the Ombudsman's view, it is incorrect to interpret "average earnings" to mean only earnings at the date of the recurrence. The term "average earnings" in common usage denotes earnings over a period of time. Section 40 therefore requires the Board to look at the earnings of the injured worker during a period prior to the recurrence.

By section 45 of the Act, the Legislature explicitly articulated a standard which echoes the implicit intent of the legislation. This section states that "average earnings" must be calculated in the manner which will best reflect the earnings of the injured worker.

In practice, the Board looks at earnings in the four weeks immediately prior to the recurrence. This would appear to be quite fair in most cases, as the latest earnings are usually the highest. However, in certain cases such as that of the complainant, it is in fact an arbitrary formula and can work an injustice. Where a worker had stable earnings until one month prior to the recurrence, it is in our view unreasonable to restrict the calculation of average weekly earnings to a four-week period without any consideration to the particular circumstances of the case. Such an application of section 40 would also appear to be contrary to the expressed intent of the Legislature with respect to "average earnings", as articulated by section 45. Furthermore, it would appear that by restricting the calculation of "average weekly earnings" to a period of four weeks only, the Board is fettering its discretion under sections 40 and 45 of the Workers' Compensation Act.

Finally, the Ombudsman noted that the Chairman has stated that sections 42 and 45 of the Workers' Compensation Act are meant to be relieving provisions in a case such as the complainant's. He was not persuaded by this argument, as the increase provided by these adjustments is considerably lower than benefits the complainant would have received had his income prior to the recurrence been taken into consideration in calculating his earnings basis.

A response was received from the then Deputy Minister, on behalf of the employer, on September 23, 1983. It stated that the Ministry was in agreement with the Appeal Board decision and wished to be afforded additional time to review this file prior to making submissions. It also pointed out that the possible recommendation would affect all employers in the province. Final Ministry submissions in this matter were received from the Deputy Minister on February 21, 1984. He stated that the Ministry is in agreement with the original criteria used by the Board in calculating the complainant's benefits. He also noted that the Ministry had found no reason to change the opinion earlier expressed by his predecessor.

The Ombudsman recognized that should our recommendation be implemented, there might be an impact on both employees and employers in similar situations. However, as it was the Ombudsman's opinion that the proposed approach would result

in a fairer application of the statute which is more in keeping with its intent, he was not persuaded that the possible impact on other similar claims should deter him from making this recommendation.

It was therefore the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, in its decision of June 4, 1981, wherein the Appeal Board approved the calculation of the complainant's temporary benefits on the basis of earnings prior to his original accident, was unreasonable. This decision appears unreasonable as it is based on an interpretation of section 40 of the Workers' Compensation Act which is too restrictive and does not give adequate weight to the words "average earnings".

It was therefore the Ombudsman's recommendation, pursuant to section 22(3)(c) of the Ombudsman Act, that the Appeal Board vary its decision and calculate the temporary total benefits on the basis of the complainant's earnings during a period greater than four weeks which would fairly represent his earnings prior to the recurrence of the disability.

The Board was notified of the Ombudsman's opinion and recommendation in a report dated March 2, 1984. By March 30, 1984, the Board had not responded, and therefore the Ombudsman referred the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 19

The complaint against the Workers' Compensation Board was first brought to the attention of this Office in a personal interview with a member of our investigative staff on February 19, 1979. At that time, the complainant advised that he was dissatisfied with an Appeal Board decision dated August 4, 1978, which denied him entitlement to an award for psychological disability attributable to an industrial accident on July 18, 1974.

By letter dated March 13, 1979, the then Chairman of the Workers' Compensation Board, was notified, pursuant to the requirements of section 19(1) of the Ombudsman Act, of our intention to investigate the complaint. He was also asked if he wished to provide a statement respecting the Board's position.

The Vice-Chairman of Appeals responded on the Chairman's behalf, indicating that the issue to be investigated had been dealt with by the Appeal Board, and the Board therefore declined to make a statement at that time.

The investigation carried out by this Office consisted of a thorough review of the Workers' Compensation Board claim file documentation, discussions with the complainant, and a review of the relevant legislation and Board policies.

The investigation revealed that the complainant has been involved in three compensable accidents. The first took place on October 10, 1972, the second, on April 30, 1973, and the third, on July 18, 1974; however, his claim to an award for psychological disability arises only from the third accident.

On July 18, 1974, while in the course of his employment as a cement mason, the complainant attempted to move a trowel machine, when he felt a sudden

sharp pain in his back. An initial diagnosis of acute strain of the lumbar spine was made by the complainant's family physician, at whose office he attended on July 22, 1974.

The first indication of any psychological disability in connection with the injury sustained in this accident is contained in the report of Dr. A., a neurosurgeon, who examined the complainant at his family physician's request in July, 1974. Following his examination, Dr. A. expressed the view that the complainant had a lumbar disc protrusion, but also felt there was "an overlying anxiety state".

In late 1974, the complainant was sent by his family physician to Dr. B., a physiatrist, who recommended acupuncture treatment to alleviate the complainant's back and neck pain, and also felt that "some psychological assistance" was indicated.

In March, 1975, Dr. B. referred the complainant to Dr. C., a psychiatrist. Following his consultation with the complainant on May 1, 1975, Dr. C. made these comments:

> Under sodium amytal there was a mild reduction in the pain, but it persisted relatively unchanged even at the deepest levels. My impression was that the complainant suffers largely from organic pain, with a mild functional overlay. His pain and disability have resulted in a chronic state of mild to moderate depression. I would think that the depression is not severely disabling, but that it relates quite directly to his injury. The complainant might benefit from a trial of anti-depressant medication, but I doubt if this will be effective in the long run unless something more definitive can be done for his pain.

In late November, 1975, following an unsuccessful attempt at returning to work, the complainant was admitted to the Workers' Compensation Board's Hospital and Rehabilitation Centre. While there, the complainant was examined by an orthopaedic consultant, Dr. D., who concluded that the complainant had a mechanical source of pain in his lower back. He was also examined by a psychiatric consultant, Dr. E., who made these comments:

> This patient gave the impression of a sincere person who appears genuinely depressed. It is very difficult to ascertain whether the depression has been caused by his back trouble and if and to what extent his emotional condition has contributed to the development and maintenance of his painful condition. However, there seems to be a connection.

On August 19, 1976, the complainant was examined by a Board Medical Officer at the Pensions Branch for the purpose of assessing him for a permanent partial disability award for the injury sustained in the July, 1974 accident. As a result of the examination, the original 10% permanent disability award for back and neck disabilities which he had been granted for injuries arising out of the 1973 accident was confirmed, and he was given a further 5% award for the exacerbation of his back disability arising out of the July, 1974 accident. No mention was made of any psychological disability at that time.

A pension review was conducted on May 11, 1977, at which time the awards for organic disability were confirmed, and once again, no mention was made of a psychological disability.

Dr. F., a psychiatrist, examined the complainant on January 25, 1978, at the request of his new family physician. Dr. F. diagnosed hysteria, and he recommended that the complainant be encouraged to return to work at the earliest possible time.

The matter came before the Appeal Board on April 17, 1978. Prior to rendering a decision, the Appeal Board referred the question of psychological entitlement to Dr. G., the Board's psychiatric consultant, for his opinion.

In a report dated April 27, 1978, Dr. G. commented that psychological entitlement did not appear to be justified on the basis of the available information, but requested a psycho-social evaluation before reaching any final conclusions.

In a brief note dated June 7, 1978, Dr. G. commented that there was no merit for a psychological entitlement.

The Appeal Board accepted and relied upon Dr. G.'s opinion, and in its decision dated August 4, 1978, stated that the complainant's psychological disability could not be attributed to his compensable accidents.

During the course of the investigation, the Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that:

> the Appeal Board was unreasonable to conclude that the complainant's psychological disability could not be attributed to the accident of July 18, 1974;
>
> the Appeal Board unreasonably delegated its decision-making power with respect to the question of entitlement, to the Psychiatric Consultant.

In a letter dated June 9, 1982, the Ombudsman advised the Chairman of the Workers' Compensation Board of these tentative conclusions and tentative recommendations. In support thereof he indicated that:

> The report rendered by the complainant's treating psychiatrist, Dr. C., relating to his examination on May 1, 1975, indicates that in his view the complainant did suffer from a psychological disability which was directly related to the accident. In his view, the complainant suffered from a form of depression that was not severely disabling, but was directly related to the accident of July 18, 1974. This view was supported by the reports of Drs. A., B., and F., and by one of the Board's Psychiatric Consultants, Dr. E. The only evidence to the contrary seems to be the opinion of Dr. F., another of the Board's Psychiatric Consultants. This opinion was rendered following the Appeal Board's referral to Dr. G. in April 1978, requesting that he evaluate the complainant's entitlement to a psychological award.

> With respect to Dr. G.'s opinion, it seems implicit in his memo dated April 27, 1978, wherein he requested a psycho-social evaluation of the complainant's family, that he recognized that the complainant did have a psychological disability. Although his memo does mention that in his view psychological entitlement did not appear justified, this decision seems to have been reached on the basis that the complainant may not have fully cooperated with Vocational Rehabilitation Services, rather than on the basis of medical evidence to this effect. In addition, Dr. G. mentioned a possible diagnosis of an inadequate personality; however, this was not suggested in any of the reports rendered by the complainant's treating physicians.
>
> In any event, the matter was referred to a social worker to perform a psycho-social evaluation. Although he agreed to be interviewed, the complainant refused to allow his wife to be interviewed, stating that his claim with the Workmen's Compensation Board had nothing to do with her. As a result, the social worker was unable to render an evaluation, and instead of conducting any further investigation into the matter, Dr. G. wrote a memo dated June 7, 1978, stating that there was no merit for psychological entitlement. It is to be noted that at no time did Dr. G. examine the complainant.
>
> In my view, Dr. G.'s report falls far short of those reports rendered by the complainant's treating physicians, and should not be given the same weight when considering the question of psychological entitlement.

The letter of June 9, 1982 concluded with the following tentative recommendations:

> It would appear that it might be open to me to recommend, pursuant to section 22(3)(c) of the Ombudsman Act, that the Appeal Board vary its decision of August 4, 1978, and grant the complainant a permanent partial disability award for his psychological disability.
>
> It would also appear that it might be open to me to recommend, pursuant to section 22(3)(d) of the Ombudsman Act, that in future the Appeal Board restrict its requests to the Medical Branch to medical opinions only, rather than a determination regarding entitlement.

By letter dated August 9, 1982, the Assistant Secretary responded on the Chairman's behalf. He stated that the psychiatric consultant had not made an entitlement decision, but had simply provided the Board with advice concerning the question "of whether or not the complainant suffered from a disabling psychological condition".

With respect to the issue of entitlement itself, the Assistant Secretary stated that the wording used by the Appeal Board was "unfortunate", since the panel had concluded that the complainant did not have a disabling psychological condition, and therefore, the question of a causal relationship did not arise.

The Assistant Secretary suggested that the complainant undergo a psycho-social evaluation, as well as an assessment by the Rating Committee for Major Psychological Disorders, to determine whether any psychological disability currently existed, before arriving at a final position.

On September 8, 1982, this Office wrote to the Assistant Secretary, and requested information concerning the basis of the Appeal Board's decision that the complainant did not suffer from a disabling psychological condition. We were advised, by letter dated September 16, 1982, that the evidence failed to support the existence of such a condition.

The Ombudsman subsequently considered the Board's response to the June 9, 1982 letter on November 24, 1982, at a case conference which he attended with his legal advisors. At that time, he concluded that the Board had satisfactorily addressed the issue of the delegation of powers to the psychiatric consultant. With respect to the issue of psychological entitlement, the Ombudsman agreed with the Board's suggestion that the complainant's psychological condition be reassessed by the Board before any final conclusions were reached.

The investigator spoke to the complainant on November 26, 1982, at which time he agreed to undergo a psychological examination, and his file with this Office was closed.

It was reopened in March, 1983, subsequent to the release of a psychiatric report by Dr. H., who examined the complainant on behalf of the Board. After reviewing his file and examining the complainant, Dr. H. concluded that he did "not feel that psychiatric entitlement is in order nor do I detect any evidence of a psychiatric disorder sufficient to warrant an award".

Accordingly, by letter dated March 29, 1983, the Ombudsman advised the Board, pursuant to section 19(1) of the Ombudsman Act, that the complainant continued to be dissatisfied with the Appeal Board's August 4, 1978 decision, and that we intended to continue with our investigation into his complaint.

Before reaching a final conclusion respecting the complaint, the Ombudsman considered all of the facts involved as outlined in the June 9, 1982 letter; the Board's letters of August 9, 1982 and September 16, 1982; Dr. H.'s psychiatric report dated February 18, 1983; and the results of the assessment carried out by the Rating Committee on Major Psychological Disorders.

It is clear from Dr. H.'s report that he did not consider the complainant to be psychologically disabled at the time of his examination in February, 1983. What he does not appear to have considered is the question of the complainant's entitlement pre-1983, which is of course the subject matter of the complaint. As a result, the Ombudsman did not find the results of Dr. H.'s psychiatric assessment to be persuasive against entitlement. The results did, however, suggest that February, 1983 would be an appropriate termination date for an award for psychological disability.

Accordingly, it was the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, by decision dated August 4, 1978, unreasonably denied the complainant an award for psychological disability.

It is therefore the Ombudsman's recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant a provisional disability award for a psychological disability from September 1, 1976, the date upon which temporary total disability benefits were terminated, until February 18, 1983, the date of Dr. H.'s psychiatric report.

The Board was notified of the results of the investigation in a report dated July 13, 1983.

In a response dated November 1, 1983, the Board advised this Office that it would not implement the Ombudsman's recommendation because, in its view, the report and subsequent addendum to that report of Dr. H. did not establish the existence of a psychological disability during the period in question.

The Temporary Ombudsman considered the Board's response and determined that there was sufficient evidence to establish the existence of a disability for the period up until Dr. H.'s assessment in February 1983. The Temporary Ombudsman therefore proceeded to report the case to the Premier. On January 9, 1984, the complainant was notified of the results of the investigation and the file was closed.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS			
10	7	That HUDAC, the Commercial Registration Appeal Tribunal and the Ministry responsible for the administration of the Act meet and arrange the implementation (of his recommendation) and that appropriate steps be taken to provide for the payment to (the complainant) of his statutory entitlement to compensation.	11, Recommendation 6	That the Ministry and HUDAC take appropriate steps to provide for payment to the complainant of his statutory entitlement to compensation under the Ontario New Home Warranties Plan Act. In the circumstances of this case, the Committee considers that the sum of $20,000 is an appropriate payment.	HUDAC has paid to the complainant $5,000, which it feels is the appriate amount.
		MINISTRY OF GOVERNMENT SERVICES			
2	60	That the Ministry pay the complainant the sum of $1,318.00 for his losses and legal expenses.	3, Recommendation 34	That the Audit Act and the Financial Administration Act be amended to provide that when such a recommendation is made by the Ombudsman after all necessary and appropriate requirements of the Ombudsman Act have been adhered to by his Office, and when entirely accepted by the governmental organization, "a lawful authority" is created for such money to be paid by the governmental organization out of the Consolidated Revenue Fund. Further, that the Ombudsman's Office and the Ministry of Government Services resume their discussions on the merits of the Ombudsman's recommendation and that the results of these discussions are to be reported to the Select Committee.	The Ministry of Treasury and Economics has responded and proposed that the Ombudsman Act is the more appropriate statute for the amendment, since the purpose of the amendment directly relates to procedure under that Act. The Ministry proposed that the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to reimburse the complainant for an ascertainable financial loss

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF GOVERNMENT SERVICES (cont'd)			
			11, Recommendation 4	That the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to compensate the complainant for an ascertainable financial loss suffered by him, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum shall, where it is less than $1,000 and has been ascertained as required by this section, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is $1,000 or more, it shall be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned.	suffered by him in the matter complained of, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than $1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is $1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned." The amendment will be included in the package of amendments to the Ombudsman Act which is expected to be tabled in the near future.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF HEALTH			
4	45	That the Ministry consider what changes should be made to the Public Hospitals Act, Sec. 47 in order to give effect to the principle of a more widely distributed membership on the Hospital Appeal Board. That the Ministry inquire into the provisions of the Public Hospitals Act with a view to preventing acts flowing from Sections 44 to 50 of that Act which may be improperly discriminatory. It was further suggested that this inquiry be assigned to an organization such as the Ontario Council of Health.	5, Recommendation 27 6, Recommendation 1 8	That the Ministry implement as soon as possible the recommendation of the Ombudsman. That the Ministry consider what changes should be made to the Public Hospitals Act and in Sec. 47 in particular, including changes in the quorum provisions and length of membership respecting the Hospital Appeal Board. Further, the Ministry cause an inquiry to be made into the provisions of the Public Hospitals Act to identify and correct any acts flowing from Sections 44 to 50 of the Act which may be improperly discriminatory. The Committee reminded the Minister of Health "that to the extent that the Council of Health identifies appropriate legislative change and so recommends to the Minister the Committee will view these legislative changes as necessary to fully comply with the recommendations in its Sixth Report".	On November 5, 1982, the Ministry advised the Committee of a draft of a proposed amendment to Regulation 865 under the Public Hospitals Act, respecting criteria applicable to applications for appointment to a hospital medical staff. It is anticipated that this draft, which satisfies the Ombudsman's recommendation, will be adopted by the middle of 1984.
9	9 and 10	That the Ministry of Health pay that portion of the complainant's claim which would have been an insured benefit had the operation been performed by a plastic surgeon. That s. 43 of Regulation 323/72 of the Health Insurance Act be amended to permit the	10, Recommendation 7	That the Ministry pay that portion of the complainants' claims which would have been an insured benefit had the operation been performed by a physician. That Section 43 of Regulation 323/72 of the Health Insurance Act, 1972 be amended to permit the General Manager to determine the amount of payment for exceptional cases on	The complainants' claims were paid. The Ministry advised that the second recommendation posed practical problems and proposed instead that the Ministry and the Ontario Dental Association meet annually so that the OHIP fee schedule is updated to cover all procedures performed by dental surgeons in hospital.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF HEALTH (cont'd)			
		General Manager to determine the amount of payment for exceptional cases where medical procedures are performed by persons in possession of the necessary hospital privileges who are not physicians.		medical procedures performed by persons in possession of the necessary hospital privileges who are not physicians. The Committee intended these recommendations to apply only to members of the Royal College of Dental Surgeons who have obtained the necessary hospital privileges.	
		MINISTRY OF HOUSING			
7	17		8, Recommendation 3	That the Ontario Housing Corporation immediately conduct a review and study of its manuals and the decision-making functions of Housing Authorities in particular for the purpose of amending its manuals to give Housing Authorities more guidance in order that the Rules of Administrative Fairness will be more strictly adhered to.	The Ontario Housing Corporation has instituted an internal review mechanism allowing applicants and tenants to seek reviews of decisions made by Local Housing Authorities. They are informed of the reasons for the decision and may appeal it to the members of the Housing Authority.
			11, page 22.	The Committee deferred further comment and consideration of the Corporation's response to the recommendation until it has received and reviewed the field manuals as amended.	The Corporation has issued a new Introduction and new chapters on Housing Development and Tenant Placement.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR			
		Workers' Compensation Board			
6	38	That the Appeal Board should reconsider its December 15, 1971 decision in the light of (this) report with a view to granting (the worker) entitlement to a permanent disability award for his disability diagnosed as post-traumatic neurosis. Any award should be made retroactive to June 4, 1971 when (the worker's) temporary benefits were terminated.	7	The W.C.B. reconsider, by hearing, its decision of December 15, 1971. In that hearing the Board should at least hear fresh evidence respecting the relationship between the complainant's symptoms and the compensable accident both from the Medical Referee appointed in 1971 and the psychiatrist retained by the Ombudsman during the course of his investigation.	On October 24, 1979, the Board rendered a decision directing that the additional medical report, the detailed summary and recommendation of the Select Committee be referred to the Medical Referee for his further opinion and report. The Medical Referee was to examine the complainant if, in his opinion, such an examination was required. After receiving the Medical Referee's report, the Board reconvened and determined that the policy of benefit of doubt was not appropriate in this case. The Appeal was denied.
			8		The Committee in its Eighth Report noted its "grave reservations that the Appeal Board Panel in this matter considered the application of the policy of the benefit of the doubt as intended by the Committee and articulated by the Corporate Board policy itself". After discussing these issues fully with with the Board, the Committee intends to report to the Legislature with any appropriate recommendations.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR Workers' Compensation Board (cont'd)			
					This case was again discussed during the Committee's hearings in September, 1981. It was agreed that the Ombudsman and the Board would make submissions on the applicability of the policy of benefit of doubt.
			10	The Workers' Compensation Board reconvene a hearing on this matter and consider the evidence of the complainant's physician and the psychiatrist retained by the Ombudsman first hand and thereafter decide whether the policy of benefits should be applied.	In response to the Committee's recommendation, the Board reconvened the hearing on September 20, 1983. A decision was issued on November 2, 1983, and the Board determined: "on the balance of probabilities, that a causal relationship between (the complainant's) condition diagnosed as post-traumatic neurosis, and the industrial accident of December 19, 1969, has not been established." The appeal was again denied. In its Eleventh Report, the Committee expressed its intent to receive further submissions from the Board and the Ombudsman prior to reaching a final conclusion.
9	19	That the Workers' Compensation Board alter its policy on attendance allowances and take into account reasonable costs.	10, Recommendation 9	"The Appeal Board Panel of the Workers' Compensation Board immediately review its decision of March 12, 1979 to determine the reasonable and actual	The Board advised the Committee that it accepted both recommendations of the Ombudsman. Pursuant to Recommendation No. 9, an Appeal

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR Workers' Compensation Board (cont'd)			
		That the Board revoke its decision and award the complainant an attendance allowance to cover reasonable costs of providing supervision and assistance which his condition necessitates.	10, Recommendation 10	costs of providing supervision and assistance which the condition of the complainant requires and if necessary increase the amount of the attendance allowance." (Recommendation No. 9) The Committee also recommended that: "The Workers' Compensation Board review by June 30, 1983, its policy concerning attendance allowances to take into consideration the reasonable cost of providing supervision for those injured workers who, as a result of accident, require someone to be in attendance in order to provide that supervision."	Board Panel reconsidered its decision of March 12, 1979 and concluded that based upon the findings the Board has made respecting the complainant's condition and degree of disability, the $280.00 currently received as an attendance allowance was adequate to cover the current costs of commercially available attendance. The Board compared the monthly allowance received to the cost of certain commercial services presumably available within a reasonable distance of the complainant's residence. The Board declined to increase the attendance allowance. This case was again discussed during the hearings in the summer of 1983. The Ombudsman challenged the conclusions of the Board that suitable services were available for the amount of attendance allowance paid. The Committee shared some of the Ombudsman's concern that the Board inquiries were not as complete as required in the circumstances. The Committee was still unable to determine whether or not the Board has properly assessed the

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR Workers' Compensation Board (cont'd)			actual costs required to meet this complainant's needs. To resolve this issue the Committee accepted suggestions made by representatives of the Workers' Compensation Board: First, if the complainant's wife confirms that she intends to obtain full-time employment, then the Workers' Compensation Board shall fund the entire cost of providing the necessary persons or person to attend to the complainant as his needs require when his wife is out of the home at work. Secondly, and in any event, the Workers' Compensation Board will immediately assemble a treatment team from their Head Injury and Neurology Clinic and undertake all necessary discussions with the complainant's family physician with a view to reconciling the different views respecting the actual attendance needs of the complainant. Thirdly, after that reconciliation has been done, the Board shall, at its expense, take all necessary steps to identify and provide an individual to attend the home and render the necessary attendance allowance.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR Workers' Compensation Board (cont'd)			
					The Committee intends to discuss the Board's implementation of these steps when it next conducts its hearings.
9	20	That the Board should cancel its decision and reconsider exercising the discretion provided by section 42 [now 43] of the Workers' Compensation Act.	10, Recommendation 11	"The Appeal Board Panel cancel its decision of July 4, 1979, grant the complainant a new hearing and reconsider his entitlement in this claim exercising the discretion given it under section 43 of the Workers' Compensation Act."	In response to the Committee's recommendation, a new hearing was held on March 26, 1984. A decision by the Board has not yet been rendered.
9	21	That the Board revoke its decision and grant the complainant the full assessed value of his permanent partial disability award.	10, Recommendation 12	"The Appeal Board Panel of the Workers' Compensation Board revoke its decisions of October 3, 1978 and grant the complainant the full assessed value of his permanent partial disability pension recognizing the non-organic component of his disability up to the date the complainant left Canada permanently."	The Board has implemented Recommendation 12.
			10, Recommendation 13	The Committee also recommended that: "The Workers' Compensation Board assess and decide whether the complainant	The Board interpreted Recommendation 13 to mean that it should consider the increased award after the

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR Workers' Compensation Board (cont'd)			
				should have continuing entitlement to the increased amount of the pension after the date he left Canada permanently."	claimant left Canada only after a reassessment had been conducted. In its Eleventh Report, the Committee clarified this recommendation.
			11, Recommendation 1	That the Workers' Compensation Board pay the complainant the increased pension amount from the date he left Canada until such time as it decides entitlement is no longer appropriate, based upon a personal assessment of the complainant either in Canada or in the country where he currently resides.	The Board has not yet responded to the Committee's further recommendation.
9	22	That the Appeal Board reconsider its previous decision with a view to granting the complainant a temporary supplement to his permanent partial disability, on the basis of a full consideration of the appropriate test for entitlement to such benefit.	10, Recommendation 14	"The Workers' Compensation Board reconsider its decision of July 24th, 1980 and its decision of November 9th, 1981 with a view to granting the complainant a temporary supplement to his permanent partial disability award on the basis of a full consideration of all relevant evidence and factors."	The Board advised the Committee that it had accepted the recommendation in the Tenth Report and issued a decision dated September 20, 1983. In that decision, the Board purported to have considered all the relevant factors, but again denied entitlement to a supplement under section 43(5) of the Act.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR			
		Workers' Compensation Board (cont'd)			
		That the Board provide reasons for its decision following the reconsideration.	11, Recommendation 2	That the Workers' Compensation Board reverse its decision of September 20th, 1983 and grant the complainant a temporary supplement to his permanent partial disability award.	During the hearings before the Committee in the summer of 1983, the Ombudsman asserted that although the original language of his recommendation was lacking in precision, it was clearly his intention that the Board grant the complainant benefits. In the Ombudsman's view, the Board had continued to deny the recommendations of both the Committee and the Ombudsman. Following these deliberations, the Committee in its Eleventh Report made a further recommendation that benefits be awarded. This recommendation has not yet been addressed by the Workers' Compensation Board.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
		MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS					
10	7	That the Tribunal and Ministry reconsider the law on which the Ministry's decision was based, and take appropriate steps to amend the regulations to comply with the Ontario New Home Warranties Plan Act.	February 23, 1983	Deputy Minister stated his intention to recommend the revision of the regulation and to reconsider the entire Act at the earliest opportunity.	11, Recommendation 5	That the Ministry of Consumer and Commercial Relations reconsider the law on which the complainant's decision was based and, with HUDAC, take all appropriate steps to amend the regulations to comply with the Ontario New Home Warranties Plan Act.	Section 6(1) of Regulation 726, R.R.O. 1980, has been replaced by: "The purchaser who has a claim under clause 14(1)(a) of the Act in respect to a purchase agreement is entitled to be paid out of the guarantee fund the amount of all deposits owing by the vendor to the purchaser under an agreement of purchase and sale to a maximum of $20,000."
		MINISTRY OF EDUCATION					
2	47	That a more comprehensive insurance policy be made available to students, one which would provide compensation for injuries resulting in the loss of future earning power.	May 4, 1977	Deputy Minister took steps to meet with insurance industry representatives regarding more comprehensive insurance for students.	3, Recommendation 23	That the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a pure accident as the result of participation in shop	The Ministry has amended s. 8(1)(i) of the Education Act as follows: "The Minister may (i) prescribe the conditions under which and the terms upon which pupils of boards shall be deemed to be employees under the Workers' Compensation Act, deem pupils to be employees for such purpose and require a board to reimburse Ontario for payments made by Ontario under that Act in respect

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		MINISTRY OF EDUCATION (cont'd)					
						classes and in organized athletic activities.	of a pupil of the board deemed to be an employee of Ontario by the Minister." The Ministry's statistical branch has provided information on enrolment and hours of risk for students in shop classes and organized athletics. The Ministry will use the information in meeting with the insurance industry to explore the costs of an insurance policy.
					11, Recommendation 3	That recommendation 23 of its Third Report be implemented by the Ministry of Education by means of a policy of insurance on a province-wide basis before the end of 1984.	
		MINISTRY OF GOVERNMENT SERVICES					
2	57	That the Public Service Superannuation Act be amended in order to eliminate all restrictions on the re-employment of provincial superannuates except where the nature of their re-employment is such that they resume contribution to the Public Service Superannuation Fund.	Aug. 31, 1976	Executive Secretary of the Civil Service Commission agreed to recommend to Management Board of Cabinet changes in Public Service Superannuation Act.	3, Recommendation 24	That the Ministry table appropriate legislation in the Legislature during the current session removing the present restriction on the total current earnings of a provincial superannuate.	Amendment to s. 16 of the Public Service Superannuation Act is currently being prepared by the Benefits Policy Branch of the Civil Service Commission and is expected to be before the Legislature next session. The amendment has been delayed, with proposed changes to other pension plans, until the governmental review of the pension industry is completed.

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		MINISTRY OF GOVERNMENT SERVICES (cont'd)					
					11, page 20.	The Committee made no recommendation but urged that Ministry and government table the amendment as quickly as possible.	It was subsequently decided not to proceed with the proposed amendment. This issue is seen as part of the larger issue of mandatory retirement age in light of the Canadian Charter of Rights and Freedoms. The effects of abolishing a mandatory retirement age are being studied by the Ministries of the Attorney General and Labour.
		MINISTRY OF HEALTH					
3	40	That: 3) The Nursing Homes Act, 1972, be amended in order that provision be made for the successful candidate for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. This licence should be conditional on compliance with the terms of the proposal and any subsequent stipulations imposed	May 4, 1977	Agreed to implement recommendation.	5, page 32.	The Committee considered this complaint for the purpose of following up with the Ministry as to the implementation of the Ombudsman's recommendation as set out at pages 177 and 178 of the Ombudsman's Third Report.	Necessary amendments have yet to be enacted. The Ministry proposed an interim arrangement whereby on any call for proposals the Ministry will undertake to the successful proposer that he be awarded a licence provided he constructs and establishes the home in accordance with the Nursing Home Act and regulations. This interim arrangement was acceptable to the Ombudsman.
					11, page 21.	The Committee accepted the interim arrangement on the understanding that the Act will be amended at some time in the future.	

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		MINISTRY OF HEALTH (cont'd)					
		by the Ministry prior to the granting of an unconditional licence.					
4	45	That the Ministry consider what changes should be made to the Public Hospitals Act, Section 47 in order to give effect to the principle of a more widely distributed membership on the Hospital Appeal Board. That the Minstry enquire into the provisions of the Public Hospitals Act with a view to preventing acts flowing from Sections 44 and 50 of that Act, which may be improperly discriminatory. It was further suggested that this inquiry be assigned to an organization such as the Ontario Council of Health.	Jan. 1978	The Deputy Minister took the position that decisions of hospital boards and the Hospital Appeal Board in general do not fall within the jurisdiction of the Ombudsman and for that reason the Ministry could only accept the Ombudsman's comments and recommendations as informal observations and suggestions.	5, Recommendation 27 6, Recommendation 1 8	That the Ministry of Health implement as soon as possible the recommendation of the Ombudsman. That the Ministry of Health consider what changes should be made to the Public Hospitals Act and Section 47 in particular, including changes in the quorum provisions and length of membership respecting the Hospital Appeal Board. Further, the Ministry of Health cause an inquiry to be made into the provisions of the Public Hospitals Act to identify and correct any acts flowing from Sections 44 to 50 of the Act which may be improperly discriminatory. The Committee reminded the Minister of Health "that to the extent that	On November 5, 1982 the Ministry advised the Committee of a proposed amendment to Regulation 865 under the Public Hospitals Act respecting criteria applicable to applications for appointment to a hospital staff. It is anticipated that this draft, which satisfies the Ombudsman's recommendation, will be adopted by the middle of 1984.

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		MINISTRY OF HEALTH (cont'd)					
						the Council of Health identifies appropriate legislative change and so recommends to the Minister, the Committee will view those legislative changes as necessary to fully comply with the recommendations in its Sixth Report".	
		MINISTRY OF LABOUR					
		Workers' Compensation Board					
2	132	That the Board either request jurisdictional determination from the courts or request that the Workers' Compensation Act be amended to give the Board the power to both collect and offset overpayments.			3, Recommendation 31	Amend the Workers' Compensation Act to provide for statutory authority to recover or write off overpayments.	Recommended amendment has yet to be enacted.

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